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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. —, Original

COMMONWEALTH OF MASSACHUSETTS,
Complainant,

vs.

STATE OF MISSOURI ET AL.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND BILL OF COMPLAINT.

PAUL A. DEVER,
Attorney General of Massachusetts.
EDWARD O. PROCTOR,
Assistant Attorney General of Massachusetts.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. —, Original

COMMONWEALTH OF MASSACHUSETTS,
Complainant,

vs.

STATE OF MISSOURI ET AL.

APPLICATION FOR LEAVE TO FILE.

Now comes the Commonwealth of Massachusetts and respectfully petitions for leave to file the annexed petition, being an original proceeding against the State of Missouri and divers citizens of the State of Missouri.

By its solicitors,

PAUL A. DEVER,
Attorney General.
EDWARD O. PROCTOR,
Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. —, Original

THE COMMONWEALTH OF MASSACHUSETTS,
Complainant,

vs.

THE STATE OF MISSOURI ET AL.

BILL OF COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Commonwealth of Massachusetts, Complainant, brings this bill against the State of Missouri, St. Louis Union Trust Company, Trustee under indenture of trust made February 14, 1921, by Madge Barney Blake, St. Louis Union Trust Company, Trustee under indenture of trust made January 11, 1929, by Madge Barney Blake, and St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees under indenture of trust made May 20, 1935, by Madge Barney Blake, Respondents, and avers as follows:

1. The complainant, The Commonwealth of Massachusetts, and the respondent, the State of Missouri, are sover-

eign States of the United States of America. The respondent, St. Louis Union Trust Company, is a corporation duly organized and existing under the laws of the State of Missouri relating to trust companies and a citizen and resident of said State of Missouri. The respondents, Charles B. Maloy and Clarence E. Maloy, are citizens and residents of the State of Missouri.

2. This is a controversy of a civil nature between two or more States of the United States of America, and between a State and citizens of another State, and, therefore, is within the original jurisdiction of this Court.

3. On or about February 14, 1921, one Madge Barney Blake executed and delivered to respondent, St. Louis Union Trust Company, as Trustee, her certain indenture of trust, wherein and whereby she assigned and conveyed to said St. Louis Union Trust Company, as Trustee, certain notes, bonds, shares of stock and other personal property particularly described and listed in the schedule attached to said indenture of trust, to be held by respondent, St. Louis Union Trust Company, in trust, for uses and purposes and upon terms and conditions and with powers and duties in said indenture defined. Said indenture provided, among the terms of the trust thereby created, that said trustee, after paying all necessary and usual expenses of preserving and managing the trust estate and those incident to the execution of the trust thereby created, should pay to the said Madge Barney Blake the remainder of the income during her lifetime. Said indenture further provided, among the terms of said trust, that, after the death of said Madge Barney Blake, said trustee, after setting apart certain trust funds for the benefit of named beneficiaries and after paying certain specific bequests, should distribute the residue of the trust estate to and among named charitable institutions in specified proportions. Said indenture further provided among the terms

of said trust that the trust therein declared, and the trust estate thereby created, and the interests thereunder vested, were subject to the express condition and reservation of the power in said Madge Barney Blake to revoke said indenture of trust in whole or in part, and to free the property constituting said trust estate or any portion thereof from the trusts therein declared, provided that such revocation should be in writing signed by her and acknowledged by her before a notary public and delivered to respondent, St. Louis Union Trust Company, whereupon the said trustee should deliver, convey and transfer to the said Madge Barney Blake the property constituting said trust estate, free from trust; and subject to the further condition that if at any time an emergency should exist requiring that the said Madge Barney Blake be permitted to withdraw from the trust and use any part of the principal thereof, the trustee should, upon her written certificate that such emergency exists and that she requires for her own use any specified property or sum of money less than the value of the trust estate, deliver and pay over to her thereupon such property or sum of money. Said Madge Barney Blake, by written assignment dated March —, 1923, (the day being omitted in the original), assigned certain shares of stock to said trustee as an addition to said trust estate. By instruments dated March 31, 1933, and June 2, 1934, respectively, said Madge Barney Blake modified said trust indenture of February 14, 1921. Copies of the indenture of trust of February 14, 1921, with the amendments of March 31, 1933, and June 2, 1934, are hereto attached, made a part hereof, and marked "Exhibit A, A(1) and A(2)," the list of securities, however, being omitted.

4. On or about January 11, 1929, said Madge Barney Blake, by indenture of trust bearing said date, transferred and assigned to Respondent, St. Louis Union Trust Company, as Trustee, certain personal property described in

a schedule attached to said indenture and marked "Exhibit A," to be held for uses and purposes and upon terms and conditions in said indenture set forth. Said indenture of trust provided among the terms thereof that said trustee should pay over the net income accruing from the trust estate to the said Madge Barney Blake so long as she should live, and after her death should pay over such net income to her husband, John Bapst Blake, or should use the same for his benefit so long as he should live, and that upon the death of her said husband, or at her death if she should survive him, said trustee should dispose of such property as should then remain in its hands and form the trust estate under said indenture, in the same manner and in the same proportions and to the same beneficiaries as was provided for the distribution of the residue of the trust fund created by her in said indenture of trust dated February 14, 1921. A copy of said indenture of January 11, 1929, is hereto annexed and marked "Exhibit B" and made a part hereof, the list of securities being omitted.

5. On or about May 20, 1935, said Madge Barney Blake, by indenture of trust bearing said date assigned and conveyed to Respondent, St. Louis Union Trust Company, as trustee, certain funds, securities and other personal property more particularly described in "Exhibit A" attached to said trust indenture and made a part thereof, in trust, however, for uses and purposes in said indenture mentioned. Said indenture of trust provided, among the terms of the trust thereby created, that, after the payment of all reasonable costs and expenses incurred in the administration of the trust estate, the said Madge Barney Blake should be entitled to receive all of the net income of the trust estate thereby created as long as she should continue to live; that after her death the income of said trust estate should be applied to the payment of specified annuities in favor of named nephews and nieces of said Madge Barney Blake,

and that upon the death of each of said annuitants, a proportionate part of the corpus of the trust estate, (subject to the remaining corpus being sufficient to satisfy the remaining annuities) and upon the death of the last annuitant to survive the balance of the corpus of the trust estate should be paid over and distributed free from trust to the same persons and in the same proportions as was provided for the distribution of the residue of the trust estate created by said indenture of trust dated February 14, 1921. In said indenture of trust of May 20, 1935, the said Madge Barney Blake reserved the right to alter, modify or amend said indenture upon her written notice to the trustee, and further reserved the right to revoke or vacate the trust in whole or in part, or to withdraw any of said funds, securities or property from its operation, at any time during her life upon her written notice to the trustee, and it was in said indenture of trust provided that upon the receipt of any such notice by the trustee revoking or vacating the trust or requesting the withdrawal of the said funds, securities or property, such trust as to such funds, securities or property, should stand revoked and vacated and the same should be delivered to the said Madge Barney Blake, free from trust. Said indenture of May 20, 1935, further provided that upon the death of said Madge Barney Blake, respondents, Charles B. Maloy and Clarence E. Maloy, should serve as co-trustees with said St. Louis Union Trust Company thereunder, and said respondents are now so serving. A copy of said indenture of May 20, 1935, is hereto annexed marked "Exhibit C" and made a part hereof, the list of securities being omitted.

6. The said Madge Barney Blake died on July 12, 1935, a citizen and resident of the Commonwealth of Massachusetts and of the United States of America, and domiciled in said Commonwealth.

7. At the time of the death of said Madge Barney Blake the Respondent, St. Louis Union Trust Company, held assets of the three trust estates consisting exclusively, except as hereinafter noted, of personal property, namely, stocks and bonds, which the complainant is informed and believes and therefore avers have an aggregate fair market value, together with interest accrued to the date of said death, in the amounts set forth below, namely—

Trust of February 14, 1921	$1,513,864.51
Trust of January 11, 1929	136,472.73
Trust of May 20, 1935	200,452.53

As a part of the trust property held under the trust of February 14, 1921, are two certificates of participation in ground rent of real estate located in the State of Missouri; valued with accrued interest to the date of death at $7,010.69 and $701.07 respectively.

8. The said Madge Barney Blake left a last will and testament, duly admitted to probate by the Probate Court of the County of Suffolk, Massachusetts, on October 21, 1935. Under said will letters testamentary were duly issued by said Probate Court on October 21, 1935, to Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts. The aggregate value of the assets comprising the estate of said decedent, administered in the Commonwealth of Massachusetts, was $12,646.02, before deduction of expenses of administration and Federal Estate Taxes.

9. Complainant is informed and avers that said executor of the estate of Madge Barney Blake filed under the Internal Revenue Laws of the United States an estate tax return; that the value, at the date of the death of said Madge Barney Blake, of the assets comprising the various trust estates referred to in Paragraphs 3, 4 and 5 of this bill of com-

plaint, were included on said return, as amended, in the gross estate of said decedent for Federal estate tax purposes; that said gross estate as returned by the executor for estate tax purposes was valued at $1,861,280.22; that said executor and said trustees have paid in respect thereto Federal estate taxes in the amount of $53,753; and that the Commissioner of Internal Revenue has determined that additional Federal estate taxes in the amount of $15,274.56 are payable by said executor or trustees, from which determination said executor has appealed to the United States Board of Tax Appeals, which appeal is now pending in said Board.

10. At the time of the death of said Madge Barney Blake there was, and now is, in effect in the State of Missouri an inheritance tax law contained in Revised Statutes of Missouri, 1929, Chapter 1, Article 21, Sections 570 to 604, both inclusive, as amended by Laws of 1930, page 130, wherein and whereby, and under said Section 570 whereof, said State of Missouri claims the right to impose a tax in the nature of a succession tax on the transfer of any property, real, personal or mixed, or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations or corporations not therein exempted: when the transfer is made by a resident, or by a non-resident of said State, when such non-resident's property is within said State or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death, and when the transfer is made by a resident or by a non-resident, when such non-resident's property is within said State or within its jurisdiction, in trust or otherwise, and the transferor has retained for his life or any period not ending before his death, (1) the possession or enjoyment of or the income from the property, or (2) the

right to designate the persons who shall possess or enjoy the property or income therefrom, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth. Said Section 570 so providing was enacted by the 1931 Legislature of the State of Missouri and went into effect September 14, 1931. It expressly provided that property which was actually vested in persons or corporations before such law should take effect, should not be subject to the tax. At the time of the execution and delivery of said Indentures of Trust dated February 14, 1921, and January 11, 1929, there was in effect in the State of Missouri, and as part of said Inheritance Tax Law, a Section (Section 570, R. S. Mo. 1929, Section 558, R. S. Mo. 1919) whereby said State of Missouri claimed the right to impose a tax in the nature of a succession tax on the transfer of any property, real, personal or mixed, or any interest therein or income therefrom, ... trust or otherwise, to persons, institutions, associations, or corporations, not exempted: when the transfer was made by a resident or by a non-resident when such non-resident's property was within the State, or within its jurisdiction, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Said State by Section 576 of said Article does not claim, and as of the date of the death of said Madge Barney Blake did not claim, such tax to be payable in respect of personal property (except tangible personal property having an actual *situs* in said State) (a) if the transferor at the time of his death was a resident of a State or territory of the United States, or of any foreign country, which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of residents of said State (except tangible personal property having an actual *situs* in such State or territory or foreign country), or (b) if the laws of the State,

territory or country of the residence of the transferor at the time of his death contained a reciprocal exemption provision under which non-residents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual *situs* therein), provided the State, territory or country of residence of such non-residents allowed a similar exemption to residents of the State, territory or country of residence of such transferor.

11. Complainant is informed and believes and upon information and belief avers that under said Inheritance Tax Law, the respondent, the State of Missouri, proposes to assess and collect an inheritance tax measured by the value of the assets comprising the trust estates referred to in Paragraphs 3, 4 and 5 of this bill of complaint; that respondent, the State of Missouri, and respondent, said St. Louis Union Trust Company, as Trustee under said Trust Indentures of February 14, 1921, and January 11, 1929, and respondents, St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, as trustees under said indenture of trust of May 20, 1935, have agreed that the amount of such inheritance tax, if exigible in respect of all said transfers, would be $182,349.69, and that said parties have agreed that said tax, if exigible in respect of said transfers of February 14, 1921, and May 20, 1935, but not in respect of said transfer of January 11, 1929, would be $168,151.93, but that said trustee respondents deny that respondent, the State of Missouri, has any jurisdiction over any of the said transfers vesting the power in it, consistently with the Constitution of the United States and the amendments thereto, to levy, assess and collect a tax on succession thereto at the death of said Madge Barney Blake, denies that said transfer of January 11, 1929, is of such nature as may, consistently with the Constitution of the United States,

be made subject to a succession tax, and claims that said State has by said Section 576 relinquished its power to impose such tax, with respect to the trust property in the State of Missouri, because the State of the domicile of Madge Barney Blake, namely, the Commonwealth of Massachusetts, at the time of her death did not impose a transfer tax or death tax of any character in respect of personal property of residents of the State of Missouri, except tangible personal property having an actual *situs* in Massachusetts.

12. Said Madge Barney Blake was at all times from January 1, 1921, until her death an inhabitant of the Commonwealth of Massachusetts. At the time of her death there was, and now is, in effect in the Commonwealth of Massachusetts an Inheritance Tax Law contained in General Laws of Massachusetts (Tercentenary Edition) Chapter 65, by which there is subjected to tax all property within the jurisdiction of the Commonwealth belonging to inhabitants of the Commonwealth which shall pass by Will, intestacy, or by deed, grant or gift made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death to any person with certain exemptions not material here and by which this tax is to be paid by the trustee. Your complainant claims the right to impose a tax on the passing of property by gift made in contemplation of death or made or intended to take effect in possession or enjoyment after death by an inhabitant of the Commonwealth when said gift takes the form of a trust of which a resident of another State is trustee.

13. Complainant says that it has jurisdiction to tax the passing of property under all of said trust indentures upon the death of said Madge Barney Blake, that it has through its duly authorized officers taken such action to determine the amount of the tax due and to certify the amount due to the persons by whom the tax is payable, as required by

the statute, as the circumstances herein set forth permit, and that there is due to it from the several trustees a total tax of $137,000. Complainant says that if it has jurisdiction to tax only the passing of property under the two revocable Trust Indentures and not under the irrevocable Trust Indenture upon the death of said Madge Barney Blake, that it has through its duly authorized officers taken such action to determine the amount of the tax due and to certify the amount due to the persons by whom the tax is payable, as required by the statute, as the circumstances herein set forth permit, and that there is due to it from the several trustees a total tax of $127,000.

14. Because of the reservation by said Madge Barney Blake in said indentures of trust dated February 14, 1921, and May 20, 1935, of the right to receive the income of the trust estates thereby created during her lifetime, and of the right to alter, amend or revoke the trusts thereby created, the transfers effected by said indentures are of a kind and nature which may constitutionally be subjected to State succession taxation at the time of her death. Because of the reservation by said Madge Barney Blake in said indenture of January 11, 1929, of the right to receive the income of the trust estate thereby created during her lifetime, the transfer thereby effected is such as may constitutionally be subjected to State succession taxes upon her death.

15. There are no persons or property subject to the processes of the courts of your complainant, the Commonwealth of Massachusetts, against whom or which the Commonwealth may proceed in the collection or attempted collection of its said tax, for the reasons that the assets composing the estate in Massachusetts will be exhausted in the payment of administration expenses and Federal estate taxes and that the Statute of the Commonwealth purports

to levy and assess succession taxes upon the trustees with respect to the trust property and not upon the executors.

16. Because of the facts set forth in the preceding paragraph of this complaint, the complainant is without remedy except in this Honorable Court. It is unable to reduce its claim for taxes to a judgment in its own courts for want of any property or persons upon whom or upon which process from its courts may be served. It is without right to compel the courts of the State of Missouri to take jurisdiction of any action it may bring against citizens of Missouri or property within the State of Missouri to enforce its claim for taxes, in view of the decisions of this Honorable Court that this right so to do is still an open question. This same inability applies to the United States Courts within the State of Missouri.

17. Both this complainant, the Commonwealth of Massachusetts, and the respondent, the State of Missouri, claim the exclusive right to subject to a succession tax the trustees and the trust property within the State of Missouri. The complainant is informed and believes, and, therefore, avers, that the respondent, the State of Missouri, intends to exercise its jurisdiction over the Trustees and the trust property within its jurisdiction, to subject such persons and property to its own succession tax, to the exclusion of the complainant and of the taxes of the complainant. Only this Honorable Court has jurisdiction to determine this controversy between these two States of the United States as to which of them has the exclusive right to levy and collect an inheritance tax upon the trustees and the trust property in the State of Missouri.

18. This Honorable Court, having the exclusive jurisdiction of this controversy between the two States of the United States and of the claim of the complainant against

the citizens of Missouri, is the only forum in which all of the questions in dispute between all of the parties can be finally settled and determined.

19. The issues presented here are (a) whether complainant, the Commonwealth of Massachusetts, or respondent, the State of Missouri, has exclusive jurisdiction over the transfers of the assets comprising said trust estates so as to have the power, consistently with the Constitution of the United States and the amendments thereto, to impose a tax on the succession thereto, and (b) secondarily whether the State having such jurisdiction may constitutionally treat the transfer effected by said indenture of January 11, 1929, as testamentary in character and subject to inheritance taxes. Complainant, the Commonwealth of Massachusetts, claims jurisdiction over said transfers by reason of the fact that the said Madge Barney Blake died domiciled within said Commonwealth, and upon her death within the Commonwealth the transfers effected by said indentures of trust became complete. The State of Missouri claims such jurisdiction by reason of the fact that the title to, and domination and control over, all of the assets of said trust estates was vested in said St. Louis Union Trust Company, a Missouri corporation doing business in the City of St. Louis, Missouri, and all such assets had a *situs* in said State in the sense that the evidences thereof were there physically located and said assets were there in fact administered. Said primary issue of jurisdiction therefore involves a direct conflict of the claims of two sovereign States.

20. In consideration whereof, and for as much as complainant is without adequate remedy save in this Honorable Court sitting as a court in equity, the complainant prays this Honorable Court to issue its writ of subpoena in due form directed to the State of Missouri and St. Louis Union

Trust Company, as trustee under each of the trust indentures herein referred to, and to Charles B. Maloy and Clarence E. Maloy, as trustees under said indenture of May 20, 1935, commanding them on a day certain to appear before this Honorable Court to answer all and singular the matters and things hereinbefore set forth and complained of, but answer to this bill of complaint need not be under oath, answer under oath of each of the respondents being hereby expressly waived.

21. And the complainant prays that this Court may determine, declare and adjudge whether the complainant, the Commonwealth of Massachusetts, or the respondent, the State of Missouri, has the jurisdiction and lawful right to impose transfer, succession or inheritance taxes in respect of said several transfers under the facts and circumstances herein presented, and may determine, declare and adjudge that the complainant has the right and jurisdiction to impose such taxes in respect of all said transfers.

22. And the complainant further prays for all other, further, different and additional relief, by injunction or otherwise, as this Honorable Court may deem expedient, and offers to do all such equity as this Honorable Court shall require.

For the Complainant,

PAUL A. DEVER,
Attorney General.
EDWARD O. PROCTOR,
Assistant Attorney General.

HENRY T. LONG,
Commissioner of Corporations and Taxation.

EXHIBIT A.

This indenture of trust, made this 14th day of February, 1921, witnesseth, that,

I, Madge Barney Blake, of the City of Boston and State of Massachusetts, in consideration of the love and affection which I have for the individual beneficiaries hereinafter mentioned or referred to and in order to provide for the maintenance after my death of certain charitable organizations hereinafter mentioned, have given, granted, assigned, set over and conveyed, and by these presents do give, grant, assign, set over and convey unto the St. Louis Union Trust Company, a corporation organized and existing under the laws of the State of Missouri, as trustee, and unto its successors and assigns, in trust, the several notes, bonds, shares of stock and other personal property more particularly described and listed in the schedule hereunto attached, marked "Exhibit A" and made a part hereof.

To have and to hold the same, and such other goods, chattels and choses in action as may hereafter during the life of this trust be acquired by said trustee pursuant to the powers hereinafter given to it, or as may be hereafter during my lifetime delivered to it as such trustee by me, *in trust*, however, for the uses and purposes, upon the terms and conditions, and with the powers and duties hereinafter stated:

Said trustee shall hold and manage said fund and such property as it may subsequently acquire or receive as aforesaid (all of which for convenience will hereinafter be referred to as "Trust Estate") and the increment thereto, with full power from time to time to sell, exchange, lease or encumber all or any portion thereof in such manner and upon such terms and conditions as it, in its discretion, may

approve, and with full power to invest any cash forming part of the principal of said trust estate and the proceeds of sale of any portion thereof, in such manner as in its opinion may be suitable, and to change investments and make new investments from time to time as to it may seem necessary or desirable; *provided, however,* that during my lifetime no such sale, lease, exchange, encumbrance or investment shall be made without my written consent, nor after my death and during the lifetime of my sister Emma Barney Maloy, unless she shall give such assent, or unless she shall request in writing that she be not consulted respecting any such sale, lease, exchange, encumbrance or investment.

Said trustee shall have the further power to collect the income from said trust estate and to determine whether any money or property coming into its hands as such trustee, or any portion thereof, shall be considered a part of the income from said trust estate and be payable to those beneficiaries who are entitled under the provisions of this instrument to said income, or shall be considered and treated as a part of the principal of said trust estate which will pass to those entitled to said principal under the provisions hereof; and to apportion between such principal and income any loss or expenditure in connection with said trust estate in any manner which to it may seem just and equitable. Said trustee shall also have the power to purchase and invest in property in other States than Missouri, and to hold in other States than Missouri, any property or securities subsequently acquired by it pursuant to the provisions hereof, and to so hold any funds hereby given to it; *provided, however,* that during my lifetime said trustee shall, when so requested by me in writing, sell any part or parts of said trust estate in the manner and for the consideration or considerations which I may in such request

express, and said trustee shall, whenever requested by me in writing so to do, invest any funds in its hands forming a part of the principal of said trust estate in the manner and by the purchase of such property as I may in such written request indicate.

Said trustee, after paying all necessary and usual expenses of preserving and managing said trust estate and those incident to the execution of the trusts hereby created, shall pay over to me the remainder of the income.

(1) After my death said trustee shall set aside money or property which in its opinion shall have at the time the reasonable value of one hundred thousand dollars ($100,000.00). It shall invest and manage such fund pursuant to the powers hereinabove given to it and pay the net annual income arising therefrom to my husband, John Bapst Blake, during his lifetime, in such instalments as may be found practicable and convenient to him. At his death, or if I shall survive him then at my death, one-third of said trust fund of one hundred thousand dollars, and of the accumulated undistributed income therefrom, shall be transferred and paid over unto the Society for the Propagation of the Faith, whose headquarters are in New York City; one-third thereof to Missouri Province Educational Institute, whose headquarters are now at St. Louis University, St. Louis; and the remaining one-third to Very Reverend Francis X. McMenamy, S. J., Provincial of the Missouri Province of the Society of Jesus, or his successor in office, for the purposes and in the proportions hereinafter expressed in paragraph three (3) hereof for the disposition of fifteen-fiftieths (15/50ths) of my residuary estate therein bequeathed to him.

(2) After my death said trustee shall set apart for each of the present four children of my sister, Emma Barney

Maloy, who shall then be living, property and money of the reasonable value at that time of fifty thousand dollars ($50,000.00) and a like amount for the joint use of all of the children of each one of said children of my said sister, who may then have died leaving a descendant or descendants living at the time of my decease; shall invest and manage said fund pursuant to the powers hereinabove conferred upon it; and shall hold the same for the uses and upon the conditions hereinafter set forth. The present four children of my sister, Emma Barney Maloy, are Charles B. Maloy, Clarence E. Maloy, Helen Maloy Wall and Alice Maloy McMahon.

(a) If either one of said sons of my said sister who shall be living at the time of my death shall have then reached the age of thirty years, one of said funds of fifty thousand dollars ($50,000.00) shall be paid over forthwith to him. If either one of her said sons shall then survive and shall then be under the age of thirty years, his said share shall be held by the trustee for his use and benefit and the net income accruing therefrom shall be paid over to him at such times and in such instalments as may be found practicable and convenient, until he shall attain the age of thirty years, at which time the principal thereof shall be paid to him free from trust. If either of said sons of my said sister who shall be living at the time of my death shall die before reaching the age of thirty years and shall leave any descendant surviving him, said fund of fifty thousand dollars ($50,000.00) so held for his benefit during his lifetime shall thereafter be held for the equal benefit, *per stirpes*, of such descendants, and the net income arising from the share of each such descendant shall be used and applied by said trustee for the support, education and best interests of him or her until he or she shall attain the age of twenty-one

(21) years, at which time the principal or *corpus* of his or her share shall be paid over to him or her outright, free from trust. If any such descendant of such deceased nephew shall die under the age of twenty-one years leaving issue, such issue shall take the share of such deceased parent. If either of my said nephews living at my decease shall die without any descendant surviving him, or if any descendant of a deceased nephew shall die without issue and before having reached the age of twenty-one years, his or her share shall be disposed of among the institutions and persons mentioned in paragraph three (3) hereof and in the proportions therein specified.

(b) During the lifetime of each of said daughters of my said sister who shall be living at the time of my death, one of said funds of fifty thousand dollars ($50,000.00) hereinabove conveyed or set apart in trust shall be held for her benefit, and the net income accruing therefrom shall be paid over to her during her lifetime at such times and in such instalments as may be found practicable and convenient. If either of them who shall be living at the time of my death shall die leaving any descendant or descendants surviving her, said trust fund shall be held for the equal benefit, *per stirpes*, of her said descendants, and the net income from the share of each such descendant shall be used and applied by said trustee for the support, education and best interests of such descendant until he or she shall attain the age of twenty-one (21) years, at which time the principal or *corpus* of his or her share shall be paid over to him or her free from trust. If any such descendant of such deceased niece shall die under the age of twenty-one, leaving issue, such issue shall take the share of such deceased parent. If either of my said nieces living at my death shall die without any descendant surviving her, or if any descendant of a de-

ceased niece shall die under the age of twenty-one without issue, his or her said share shall be disposed of among the institutions and persons mentioned in paragraph three (3) hereof and in the proportions therein specified.

(c) If at the date of my death either of my said nephews or nieces above named shall have died leaving descendants then living, the fund of fifty thousand dollars ($50,000.00) hereinabove conveyed or set apart in trust for the descendants of each such niece and nephew shall be held for their equal benefit, *per stirpes*, and the net income accruing from the share of each of said descendants shall be used and applied by said trustee for the support, education and best interests of each such descendant until he or she shall attain the age of twenty-one years, at which time the principal of his or her share of said trust estate shall be transferred or paid over to him or her outright, free from trust. If, however, any such descendant of a deceased nephew or niece of mine shall die before having reached the age of twenty-one (21), and shall leave issue surviving him or her, such issue shall take the share of such deceased parent, but if no issue shall survive, said share of such deceased parent shall be disposed of among the institutions and persons mentioned in paragraph three (3) hereof, and in the proportions and for the purposes therein set forth.

(d) If my friend Florence Gilmore, of Columbus, Ohio, or her daughter Florence, shall be living at the time of my death, the trustee shall set apart and hold in trust money or property of the fair value of twenty thousand dollars ($20,000.00), with all the powers of management, sale and investment hereinabove conferred upon it. During the lifetime of my said friend said trustee shall pay to her out of the income, and if necessary out of the principal, an annuity of nine hundred dollars ($900.00) in equal monthly in-

stalments of seventy-five dollars ($75.00) each. At her death, or if she shall not survive me then at my death, the said annuity of nine hundred dollars ($900.00) shall be paid to her said daughter Florence during her lifetime in instalments as aforesaid. After the death of both of said beneficiaries the said principal fund and any excess of income from said fund shall be disposed of as hereinbelow directed in paragraph numbered three (3) hereof.

(e) If Susan Flynn, daughter of my friend, Mrs. Anne Skinner, of New York City, shall be living at the time of my death, the trustee shall set apart and hold in trust money or property of the fair value of twenty thousand dollars ($20,000.00), with all the powers of management, sale and investment hereinabove conferred upon it. During the lifetime of said Susan Flynn said trustee shall pay to her out of the income, and if necessary out of the principal, an annuity of nine hundred dollars ($900.00) in equal monthly instalments of Seventy-five dollars ($75.00) each. After the death of said beneficiary the said principal fund and any excess of income from said fund shall be disposed of as hereinbelow directed in paragraph numbered three (3) hereof.

(f) If Katy Darcy, of St. Louis, Missouri, or her sister Julia, shall be living at the time of my death, the trustee shall set apart and hold in trust money or property of the fair value of fourteen thousand dollars ($14,000.00), with all the powers of management, sale and investment hereinabove conferred upon it. During the lifetime of the said Katy Darcy said trustee shall pay to her out of the income, and if necessary out of the principal, an annuity of six hundred dollars ($600.00) in equal monthly instalments of fifty dollars ($50.00) each. At her death, or if she shall not survive me then at my death, the said annuity of six

hundred dollars ($600.00) shall be paid to her said sister Julia, during her life time, in instalments as aforesaid. After the death of both of said beneficiaries the said principal fund and any excess of income from said fund shall be disposed of as hereinbelow directed in paragraph numbered three (3) hereof.

(g) The trustee shall give, as a remembrance from me to the children of my husband, the following amounts: Two thousand dollars ($2,000.00) to Barbara; one thousand dollars ($1,000.00) to Betty; and five hundred dollars ($500.00) to each of his sons.

(h) To each of the grandchildren of my sister, Emma Barney Maloy, who may be living at the time of my death, the trustee shall give the sum of five thousand dollars ($5,000.00); and if subsequent to my death and within twenty-one years thereafter there shall be born to any of my said nieces or nephews any additional child or children and after the birth of any one or more of them there shall from time to time and within twenty-one years after my death, revert to or remain in the hands of the trustee any funds or property, theretofore held by it in trust for any beneficiary whose right therein or in the income therefrom shall have ended by death or otherwise, which fund by the terms hereof would but for this provision be disposed of under paragraph three (3) hereof, the trustee shall use such fund or property, so far as it will suffice, in making payments to each such afterborn grandniece or grandnephew of mine, until he or she shall have received the sum of five thousand dollars ($5,000.00); *provided, however,* that when any such fund shall so revert by death of life beneficiary or otherwise and it or any part of it shall not be necessary to complete the payment to each of such grandnieces or grandnephews then living, of the full sum of five

thousand dollars, said fund or so much thereof as may not be needed to complete such payments shall be forthwith distributed as provided in paragraph three (3) hereof.

(i) If the trust property shall not be sufficient to pay all of the foregoing amounts I direct that they shall be paid in the order named, each gift in its serial order being fully paid before any of the succeeding gifts shall be paid either in whole or in part.

(j) If any succession tax or tax upon any of the gifts hereinabove made be lawfully levied or assessed by the Government of the United States or of the State of Missouri against either the trustee or any beneficiary hereunder, such tax shall be paid by the trustee as an expense of the administration of this trust.

(3) If, after paying all of the foregoing gifts, any property shall remain in the hands of the trustee, it shall be disposed of as follows after having paid to His Grace, Most Reverend John J. Glennon, Archbishop of St. Louis, Missouri, or his successor in that office, the sum of five thousand dollars ($5,000.00), to establish a burse in Kenrick Seminary, called the Burse of the Holy Ghost, for the education of young men for the priesthood. That is to say:

All said residue of the said property hereinabove assigned or conveyed in trust and also all funds which shall remain in the hands of the trustee after the termination of any of the trusts hereinabove created and expressed and directed to be disposed of as in this paragraph three (3) provided, subject to their contingent use pursuant to clause (h) of paragraph two (2) hereof, shall be distributed among the following persons and institutions in the following named proportions: Fifteen-fiftieths (15/50ths) to the said Society for the Propagation of the Faith, whose

headquarters are in New York; fifteen-fiftieths (15/50ths) shall be paid and transferred to the Very Reverend Francis X. McMenamy, S. J., Provincial of the Missouri Province of the Society of Jesus, or, in case at the time of my death he shall not hold said office of Provincial of the Missouri Province, then to the person who at that time is performing the duties of said office, for the missions of the Society of Jesus in China, Japan, India, Africa and the United States of America; one-fifth of such amount to be given by him to the missions in each one of the five countries mentioned. I leave it to his discretion to determine how in each one of the five countries mentioned said one-fifth is to be divided among the various missions of the Society of Jesus which are established in each of said countries, with this proviso: that one-quarter (¼) of the sum given to the missions of the Society of Jesus in the United States of America shall be devoted to the undertakings of said Society of Jesus among the Indians of this country and the other three-quarters (¾) to their undertakings among the Negroes.

And the remaining twenty-fiftieths (20/50ths) shall be paid and transferred, in the proportions stated, to the following named institutions.

To the Convent of the Good Shepherd, in St. Louis, Missouri, one-ninety-sixth (1/96th) thereof;

To the Convent of the Good Shepherd, in Boston, Massachusetts, one-ninety-sixth (1/96th) thereof;

To the Little Sisters of the Poor, in St. Louis, Missouri, one-forty-eighth (1/48th) thereof, to be divided equally between the two houses of said order in the City of St. Louis;

To the Little Sisters of the Poor, in Boston, Massachusetts, one-forty-eighth (1/48th) thereof;

To the Catholic Foreign Mission Society of America,

whose headquarters are in Ossining, New York, seven-forty-eighths (7/48ths) thereof.

To the Missouri Province Educational Institute, whose headquarters are in St. Louis, Missouri, twenty-eight-forty-eighths (28/48ths) thereof;

To the Helpers of the Holy Souls in Purgatory, whose headquarters are in St. Louis, Missouri, two-forty-eighths (2/48ths) thereof;

To the Catholic Church Extension Society of United States of America, whose headquarters are in Chicago, Illinois, eight-forty-eighths (8/48ths) thereof;

Provided, however, that if either of my said nephews above or any one or more of my stepsons now living, before said fund provided for under this paragraph three (3) hereof shall have been divided and distributed as next hereinabove directed, shall have taken orders and entered the Catholic priesthood, then the sum of five thousand dollars ($5,000.00) shall be paid first out of said residuary fund to each such nephew and stepson so taking orders, and entering the Catholic priesthood, to be used by him for religious or charitable purposes, as he may see fit; and the remainder of the fund shall be distributed among the institutions in this paragraph three (3) mentioned and in the proportions herein expressed. Said sum so payable to either of my said nephews shall be in addition to any sum to which he may be entitled under any provision of this instrument, and the same shall be true of any such sum so payable to either of my stepsons.

(4) The income from said trust estate hereby provided for each of said beneficiaries shall not be liable for his or her debts, present or future, and shall not be subject to the right on the part of any creditor to seize or reach the same under any writ or by any proceeding at law or in

equity, and no such beneficiary shall have any power to give, grant, sell, convey, mortgage, pledge or otherwise dispose of, encumber or anticipate the income or any instalment thereof, or any share of the principal of said trust estate, it being my desire and I so direct that no right of disposition of any such property shall vest in any beneficiary hereunder until the same shall have been actually transferred or paid over to him or her.

This trust is herein declared and the trust estate is herein created and the interests hereunder are vested subject to the express condition and reservation of power in me, said Madge Barney Blake, to revoke this indenture of trust in whole or in part, and to free the property constituting said trust estate, or any portion thereof, from the trusts herein declared, provided that such revocation shall be in writing, signed by me and acknowledged by me before a notary public, and delivered to the St. Louis Union Trust Company; and thereupon the trustee hereunder shall deliver, convey and transfer to me the property constituting said trust estate, free from trust; and subject to the further condition that if at any time an emergency shall exist requiring that I be permitted to withdraw from the trust and use any part of the principal the trustee shall, upon my written certificate that such an emergency exists and that I require for my own use any specified property or sum of money less than the value of the trust estate, deliver and pay over to me thereupon such property or sum of money, and my receipt therefor shall be full acquittance to said trustee from further responsibility with respect to such property or money to account to any person or institution, whomsoever.

(5) If after my death said trustee shall think it advisable or desirable to postpone the division of the trust estate it

may hold the same intact for any period not exceeding three years, paying out during such time only the following incomes: to my husband five thousand dollars ($5,000.00) per annum; to each of my said nephews or his descendants in case of his death, twenty-five hundred dollars ($2500.00) per annum; to each of my said nieces or her descendants in case of her death, twenty-five hundred dollars ($2500.00) per annum; to said Florence Gilmore or her daughter, nine hundred dollars ($900.00) per annum; to said Susan Flynn, nine hundred dollars ($900.00) per annum; and to Katy Darcy or her sister Julia, six hundred dollars ($600.00) per annum.

In witness whereof, I, Madge Barney Blake, have hereunto set my hand and the St. Louis Union Trust Company as evidence of its consent to act as trustee hereunder has caused these presents to be executed in its corporate name by its Vice-President, and its corporate seal to be hereunto affixed, duly attested by its Secretary, on the day and year herein first written.

Executed in duplicate.

MADGE BARNEY BLAKE, [SEAL.]

ST. LOUIS UNION TRUST COMPANY,

By JOHN F. SHEPLEY,

[SEAL.] *President.*

Attest:

M. F. HAINES,

Asst. Secretary.

The undersigned, John Bapst Blake, husband of the grantor in the foregoing deed of gift in trust, approves of the disposition of the property, therein described or referred to, in the manner therein set forth; hereby assents to the execution thereof by his wife, the said Madge Barney

Blake; and hereby releases and renounces all his marital rights, vested and inchoate, in said property.

JOHN BAPST BLAKE.

See memo—John R. Shepley, 4/1/33, *in re* commission on income to be 2½%.

Compensation of the trustee named in above indenture shall be limited to a commission of 5% of the income and 2½% of reasonable value of the principal when finally distributed.

In case of revocation of the instrument no commission on the principal will be taken.

JOHN F. SHEPLEY,
Prest.

February 14, 1921.

EXHIBIT A (1).

First Amendment.

Whereas, I, Madge Barney Blake, did, on the 14th day of February, 1921, execute a certain trust indenture, wherein the St. Louis Union Trust Company is named trustee, and

Whereas, in and by the terms of said indenture I reserved the right to revoke its terms in whole or in part at such time and in such manner as I may desire;

Now, therefore, in pursuance of such power reserved in me, I hereby amend said indenture as follows:

At the death of any beneficiary thereunder any accrued net income and undistributed net income of his or her share shall go to the next estate as income unless the trust as to such share terminates upon the death of such beneficiary in which event said accrued and undistributed net income shall be distributed as a part of the principal of such share.

In addition to the direction given to the trustee by the

terms of paragraph (2) (j) of said indenture, I direct that the trustee shall pay as an expense of the administration of the trust all succession taxes or tax upon any of the gifts made under said indenture lawfully levied or assessed by any State of the United States or by the United States against either the trustee or any beneficiary under said indenture.

Except as hereinabove amended, I hereby ratify and confirm said trust indenture dated February 14th, 1921.

In testimony whereof, I have hereunto set my hand and seal this 31st day of March, 1933.

MADGE BARNEY BLAKE. [SEAL.]

Notice of the above amendment is hereby acknowledged.

ST. LOUIS UNION TRUST COMPANY,
As Trustee,

[SEAL.]

By JOHN R. SHEPLEY,
Vice-President.

Attest:
M. McCONNELL,
Assistant Secretary.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 1st day of April, 1933, before me personally appeared Madge Barney Blake, to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in the State of Missouri, the day and year in this certificate first above written.

LIN D. HAM,
Notary Public.

[SEAL.]

My Commission expires June 5, 1934.

EXHIBIT A (2).

Amendment to Trust Indenture.

Whereas, I, Madge Barney Blake, of Boston, Massachusetts, did on the 14th day of February, 1921, execute a certain trust indenture wherein the St. Louis Union Trust Company is trustee, and

Whereas, in and by the terms of the said indenture I reserved the right to revoke the same in whole or in part, and

Whereas, I executed an amendment to said indenture of trust on March 31, 1933;

Now therefore, I hereby further amend the said indenture as follows:

I hereby revoke that portion of the said indenture reading as follows:

> "Provided, however, that during my lifetime no such sale, lease, exchange, encumbrance or investment shall be made without my written consent, nor after my death and during the lifetime of my sister, Emma Barney Maloy, unless she shall give such assent, or unless she shall request in writing that she be not consulted respecting any such sale, lease, exchange, encumbrance or investment."

I direct, however, that during my lifetime my stock in the Burroughs Adding Machine Company shall not be sold by my trustee without my written consent.

I hereby approve all of the investments previously made by my trustee for the account of the trust estate without my written consent and approval.

Except as herein amended I hereby ratify and confirm the said indenture of trust and first amendment thereto in every other respect and particular.

In testimony whereof, I have hereunto set my hand and seal this 2 day of June, 1934.

MADGE BARNEY BLAKE. [SEAL.]

Notice of the above Amendment is hereby acknowledged.

ST. LOUIS UNION TRUST COMPANY,

Trustee,

By JOHN R. SHEPLEY,

Vice-President.

STATE OF MISSOURI,

City of St. Louis, ss:

On this 2nd day of June, 1934, before me personally appeared Madge Barney Blake, to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in the city and State aforesaid the day and year in this certificate first above written.

LIN D. HAM,

[SEAL.] *Notary Public.*

My term expires June 5, 1934.

EXHIBIT B.

Know all men by these presents, That I, Madge Barney Blake, of the City of Boston, and State of Massachusetts, in consideration of the love and affection which I have for the beneficiary hereinafter named, have assigned, conveyed and set over, and by these presents do assign, convey and set over unto the St. Louis Union Trust Company, a corporation organized under the laws of the State of Missouri, as trustee, the property described in the schedule hereto attached and marked "Exhibit A", to hold the same for the

uses and purposes and upon the terms and conditions hereinafter set forth, that is to say:

Said trustee shall receive and hold said property, investing such part thereof as may be in cash by lending the same upon such terms and conditions as it may approve, or by the purchase of any stocks, preferred or common, bonds or other personal property which it may select for such purpose, with power at any time and from time to time to sell or otherwise dispose of any property so acquired or constituting a part of the trust estate for such consideration and upon such terms as it may approve, and with power and authority to make and change such investments as it may see fit, and shall pay over the net income accruing therefrom to me, so long as I shall live, and after my death to my husband, John Bapst Blake, or use the same for his benefit, so long as he shall live. If at any time, in the opinion of said trustee, my said husband shall need more than the net income accruing from said invested fund, it shall have power at any time and from time to time to convert and use for his benefit part of the principal, provided the amount paid or used for his benefit from income and principal, shall not exceed the sum of five thousand dollars ($5,000.00) in any one year.

At the death of my said husband, or at my death if I shall survive him, the trustee shall dispose of such property as shall then remain in its hands and form the trust estate hereunder, in the same manner and in the same proportions and to the same beneficiaries as is provided for the distribution of the residue of the trust fund created by me in an instrument of trust dated February 14th, 1921, in which I was donor and the St. Louis Union Trust Company was named as trustee,

In testimony whereof, I, Madge Barney Blake, have hereunto set my hand and seal, and the St. Louis Union Trust Company, as evidence of its consent to act as trustee here-

under, has caused these presents to be executed in its corporate name by its Chairman of its Board and its corporate seal to be hereunto affixed, duly attested by its Secretary, this 11th day of January, 1929.

(S.) MADGE BARNEY BLAKE, [SEAL.]
ST. LOUIS UNION TRUST COMPANY,
(S.) By JOHN F. SHEPLEY,
Chairman.

Attest:
WALLIS G. ROWE,
Secretary.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

On this 11th day of January, 1929, before me personally appeared Madge Barney Blake, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

Witness my hand and notarial seal the day and year above written.

(S.) NELSON B. VANDERHOOF,
Justice of the Peace.

My commission expires Nov. 16, 1934.

EXHIBIT C.

Indenture of Trust.

This indenture, made and entered into this 20th day of May, 1935, by and between Madge Barney Blake, of the City of Boston and State of Massachusetts, hereinafter referred to as the "Donor", and St. Louis Union Trust Company, a Missouri corporation, hereinafter referred to as the "Trustee", Witnesseth:

That the said Donor has assigned, transferred, conveyed and delivered, and by these presents does hereby assign, transfer, convey and deliver unto the said trustee, certain funds, securities and property more particularly described in "Exhibit A" attached hereto and made a part hereof, in trust, however, for the uses and purposes hereinafter mentioned:

SECTION #1. The said trustee shall have full power and authority to manage and control the trust estate and to hold, sell, exchange, lease, rent, mortgage, pledge, assign, transfer, or otherwise dispose of all or any part thereof, at such times, for such consideration and upon such terms and conditions as it may see fit, and it may invest and reinvest all or any part of the trust estate in such stocks, common or preferred, bonds, notes, securities or other property as it may deem most advisable, and it may make and change such investments from time to time according to its discretion.

SECTION #2. After the payment of all reasonable costs and expenses incurred in the administration of the trust estate, the net income shall be devoted to the following uses and purposes: As long as the donor continues to live, she shall be entitled to receive all of said net income. If at the time of the donor's death her sister, Emma Barney Maloy, shall be living, she shall be entitled to receive all of said net income for and during the balance of her natural life. Upon the death of the said Emma Barney Maloy, or if she shall not be living at the time of the donor's death, then upon the death of the donor, said income shall be used to provide for such of the children of the said Emma Barney Maloy as shall then be living for and during their respective natural lives an annual income equal to the amount set opposite their respective names as follows:

Charles B. Maloy	$2400.00
Clarence E. Maloy	2400.00

Helen Maloy Wall	$3000.00
Alice Maloy McMahon	3000.00

provided, however, that in case the net income shall during any period or periods be less than the amount required to provide for the above payments in full, the payments to the said children shall be reduced proportionately. Upon the death of any one or more of said children, the trustee shall distribute free from trust, in the case of each such death (said distribution to be made to the persons and corporations and in the proportions as hereinafter provided for the distribution of this trust estate upon the termination thereof), such proportion of the *corpus* of the trust estate as the income thereof payable annually to such decedent bears to the total annual income to be distributed to all of said children; provided, however, that the trustee may retain and continue to hold as part of the *corpus* so much thereof as in its judgment may be necessary to insure to the remaining children the payment of the annual income hereinabove mentioned. All payments of income to be made under the terms of this indenture shall be made in monthly or other convenient installments.

Section #3. This trust shall terminate upon the death of the last to survive of the donor, her said sister, Emma Barney Maloy, and the above mentioned children of the said Emma Barney Maloy, and the property then constituting this trust estate, including both *corpus* and undistributed income, shall be paid over and distributed free from trust to the same persons and corporations and in the same proportions as is provided for the distribution of the residue of the trust estate created by the indenture of trust executed on the fourteenth day of February, 1921, by the donor, Madge Barney Blake, as donor, and St.

Louis Union Trust Company, as trustee, in paragraph (3) thereof.

SECTION #4. Upon the donor's death, the said Charles B. Maloy and the said Clarence E. Maloy shall serve as co-trustees with the St. Louis Union Trust Company, and thereafter said trustees shall have and may exercise all of the powers hereinbefore expressly conferred upon said St. Louis Union Trust Company as trustee.

SECTION #5. As compensation for the services to be rendered hereunder, the corporate trustee (whether serving alone or as co-trustee) shall be entitled to receive a sum equal to two and one-half per cent (2½%) of all distributions of income made during the existence of this trust, said compensation to be paid as and when each such distribution shall be made. In addition thereto, as and when the *corpus* of this trust estate, or any part thereof, shall be distributed, free from trust, under the provisions of this indenture, said corporate trustee shall be entitled to receive a sum equal to two and one-half per cent (2½%) of the fair value of the *corpus* so distributed.

The individual trustees, as compensation for the services to be rendered by them, shall be entitled, collectively, to receive a sum equal to two and one-half per cent (2½%) of all distributions of income made during the period of their service as such trustees, said compensation to be divided equally between them. If, because of death or any other reason, only one of said individuals shall during any period act as co-trustee, then he shall be entitled during such period to receive all of the compensation hereinabove provided for the individual trustees.

SECTION #6. None of the beneficiaries of the trust herein created shall have the power or authority to sell, assign, pledge or otherwise anticipate any income or equitable in-

terest to which he or she may be entitled under the terms of this indenture, nor shall the same be subject to the debts of said beneficiaries or subject to any process at law or in equity to subject the same to the claims of their creditors, and any attempt upon the part of any beneficiary to violate the terms of this Section #6 shall be null and void.

Section #7. The donor hereby reserves the right to deposit other and additional funds, securities and/or property with the trustee to become a part of the trust estate herein created and subject to all of the terms and provisions of this indenture; and upon the receipt of any such funds, securities and/or property by the trustees, then and thereupon such funds, securities and/or property shall be and become a part of the trust estate herein created subject to all of the terms and provisions hereof.

Section #8. The donor hereby reserves the right to alter, modify or amend this indenture upon her written notice to the trustee, and upon the receipt by said trustee of such notice, together with a copy of the alteration, modification or amendment of this indenture, the same shall thereupon be and become a part of this indenture, and the trust estate shall be administered and distributed under the terms and provisions of this indenture as thus altered, modified or amended.

Section #9. The donor hereby reserves the right to revoke and vacate this trust in whole or in part, or to withdraw any of the said funds, securities or property from its operation at any time during her life, upon her written notice to the trustee, and upon the receipt of any such notice by the trustee revoking or vacating this trust or requesting the withdrawal of any of the said funds, securities or property, this trust as to such funds, securities or

property shall stand revoked and vacated, and the same shall be delivered unto the donor free from trust.

In Witness Whereof, the donor has hereunto set her hand, and the trustee, as evidence of its consent to act as trustee hereunder, has caused these presents to be executed in its corporate name by its vice-president and its corporate seal to be hereunto affixed, duly attested by its secretary, on the day and year first above written.

Executed in duplicate.

(S.) MADGE BARNEY BLAKE,
Donor.

ST. LOUIS UNION TRUST COMPANY,
Trustee.

By WM. R. SHEPLEY,
Vice-President.

Attest:
H. B. GROSS,
Asst. Secretary.

SEP 16 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1938.

No. , Original.

THE COMMONWEALTH OF MASSACHUSETTS,
Complainant,
v.
THE STATE OF MISSOURI ET ALS.,
Respondents.

COMPLAINANT'S BRIEF IN SUPPORT OF MOTION TO FILE BILL OF COMPLAINT.

PAUL A. DEVER,
Attorney General for the Commonwealth of Massachusetts,
EDWARD O. PROCTOR,
Assistant Attorney General.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1938.

No. , Original.

THE COMMONWEALTH OF MASSACHUSETTS,
Complainant,
v.
THE STATE OF MISSOURI ET ALS.,
Respondents.

COMPLAINANT'S BRIEF IN SUPPORT OF MOTION TO FILE BILL OF COMPLAINT.

THE CASE.

The complainant is the Commonwealth of Massachusetts. The respondents are the State of Missouri and the St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees, all citizens of the State of Missouri (Bill, p. 1).

Original jurisdiction of this Court is claimed under article III, section 2, of the Constitution, upon two grounds: that there is presented a controversy between a State and citizens of another State, and that there is a controversy between two States (Bill, p. 1, par. 2).

The Facts Briefly Summarized.

Madge Barney Blake of Boston, Massachusetts, died in Boston, July 12, 1935, leaving an estate in Massachusetts of only $12,646.02, which has been administered by the executor under her will appointed by the Massachusetts Probate Court (Bill, pp. 7, 8, pars. 6, 8). This estate has been exhausted by costs of administration and Federal taxes (Bill, p. 18, par. 15).

The decedent, during a period of fourteen years immediately prior to her death, while domiciled in Massachusetts, created three trusts and placed securities thereunder of an aggregate value, at the time of her death, of $1,850,789.77 (Bill, p. 8, par. 7). The trustees are all residents of Missouri, where the securities are held (Bill, p. 1; p. 14, par. 17).

These trusts were as follows:

February 14, 1921 trust: (value $1,513,864.51), net income payable to the settlor for life, after her death the corpus to be distributed free of trust to designated remaindermen, the settlor reserving the right of revocation (Bill, pp. 4, 5, par. 3).

January 11, 1929 trust: (value $136,472.73), net income payable to the settlor for life, and on her death to her husband for life if he survived, after the death of both the corpus to be distributed free of trust to the remaindermen under the first trust; the settlor not reserving the right of revocation (Bill, pp. 5, 6, par. 4).

May 20, 1935 trust: (value $209,452.53), net income payable to the settlor for life, and on her death for the payment of specified annuities to certain nieces and nephews, after their several deaths the corpus to be distributed free of trust to the remaindermen under the first trust; the settlor reserving the right of revocation (Bill, pp. 6, 7, par. 5).

Both Massachusetts and Missouri have inheritance tax statutes subjecting to taxation property passing by deed, grant or gift made or intended to take effect in possession or enjoyment after the death of the donor (Bill, p. 9, par. 10; p. 12, par. 12).

The Massachusetts statute imposes the tax upon intangibles only when owned by Massachusetts inhabitants (Bill, p. 12, par. 12; Appendix, *infra*, p. 19). The Missouri statute exempts from the tax intangibles owned by non-residents who reside in States extending reciprocal provisions to Missouri residents (Bill, bot. p. 10, par. 10).

Both States claim the exclusive right to impose inheritance taxes upon the trust estate; and Missouri, where the trustees reside and the property has its situs, intends to exercise its jurisdiction over the trustees and the property, to the exclusion of Massachusetts and its claim (Bill, p. 14, par. 17; Return of Mo., pp. 3, 4, par. 1). Massachusetts has "through its duly authorized officers taken such action to determine the amount of the tax due and to certify the amount due to the persons by whom the tax is payable, as required by the statute, as the circumstances . . . permit" and there is now due to it from the respondent trustees $137,000 if all the trusts are taxable, and $127,000 if only the two revocable trusts are taxable (Bill, pp. 12, 13, par. 13).

There are no persons or property in Massachusetts from whom or which Massachusetts may collect the tax (Bill, p. 13, par. 15).

The respondent trustees, all citizens of Missouri, deny their liability to pay the Massachusetts tax, on the ground of want of jurisdiction to impose it (their Return, pp. 3, 4, par. 2).

All the parties respondent voluntarily submit to the Court's jurisdiction and pray for a decision of the contro-

versy (Return of Mo., p. 4, pars. 3-5; Return of other respondents, p. 4, par. 3).

The Constitutional provisions under which original jurisdiction is claimed.

Art. III, sec. 2, of the Constitution provides:

> "Sect. 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—*to controversies between two or more states;—between a state and citizens of another state;* —between citizens of different states,—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
>
> "*In all cases* affecting ambassadors, other public ministers and consuls, and those *in which a state shall be party, the supreme court shall have original jurisdiction.* In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make." (Italics supplied.)

Provisions of the Judicial Code relative to original jurisdiction.

Judicial Code, sec. 233; 36 Stat. 1156; 28 U.S.C. sec. 341:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State

is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. . . ."

Argument.

I. There is presented a controversy between the Commonwealth of Massachusetts and citizens of the State of Missouri.

The allegations of the bill of complaint and of the return of the respondent trustees exhibit a justiciable controversy of a civil nature between the Commonwealth and the respondent citizens of Missouri.

Massachusetts by this action seeks to assert its right to impose and collect an inheritance tax upon the transmission of the intangible property in Missouri by virtue of the decedent's domicil in Massachusetts. With respect to the intangibles in the revocable trusts, Massachusetts invokes the principles announced in *Graves* v. *Elliott,* 83 Law. Ed. Ad. Op. 880 (decided May 29, 1939), that the decedent's right to revoke the trust had the attribute of property, and that control of her person and estate at the place of her domicil afforded constitutional basis for imposition of the tax. (With respect to the intangibles in the irrevocable trust Massachusetts must rely on other principles not now necessary to consider.)

In view of the recent decisions of *Graves* v. *Elliott, supra,* and *Curry* v. *McCanless* (same date, 83 Law. Ed. Ad. Op. 865), Massachusetts must now recognize that Missouri also has constitutional power to tax the transfer, though whether its statutes exercise that power with respect to the present trusts, in view of the reciprocity provision of the statute, is another question.

But Massachusetts, with the constitutional power to tax, fully exercised by and under the statute (Mass. General Laws [Ter. Ed.] c. 65, Appendix hereto, pp. 19-20), is unable to enforce payment of the tax within its own borders. As the tax is imposed upon the trustees, who are residents of Missouri and beyond the jurisdiction of Massachusetts' courts, it can enforce the tax only by recourse to the Missouri or Federal courts.

The respondent trustees deny their liability to pay the tax, on the ground that Massachusetts has no jurisdiction to impose it (their Return, p. 3, par. 2).

There exists, therefore, a controversy between Massachusetts and the respondent citizens of the State of Missouri.

Is it a controversy of such a character as to confer jurisdiction upon this Court?

The purpose of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another "was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens."

Massachusetts v. *Mellon*, 262 U.S. 447, 480, 481.
Wisconsin v. *Pelican Insurance Co.*, 127 U.S. 265, 289.
Chisholm v. *Georgia*, 2 Dall. 419, 475.
Story on the Constitution, secs. 1638, 1682.

And if the facts present such a case, the Court may not deny jurisdiction because numerous similar cases might "be brought within its cognizance."

Minnesota v. *Hitchcock*, 185 U.S. 373, 384:

Brewer, J.:

"... In respect to the second [ground for jurisdiction] it may be said that if it were held that this court had original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance. To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution. . . ."

A controversy "between two or more states" or "between a state and citizens of another state" of which this Court has original jurisdiction must be of a justiciable nature properly determinable in a judicial proceeding.

Texas v. *Florida* (decided March 13, 1939), 83 Law. Ed. Ad. Op. 549, 554:

Stone, J.:

"So that our constitutional authority to hear the case and grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable 'case' or 'controversy' within the meaning of the Constitutional provision, and whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence, . . ."

(Taking original jurisdiction of a suit among four States to determine which was the State of decedent's domicil for

inheritance tax purposes, where the estate was insufficient to meet the claims of all the States.)

Minnesota v. *Hitchcock*, 185 U.S. 373, 388:

Brewer, J.:

> "Our conclusion, therefore, is . . . that a dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding; . . ."

(Taking original jurisdiction of an action by Minnesota to enjoin the Secretary of the Interior from selling lands to which Minnesota claimed title against the United States.)

Massachusetts v. *Mellon*, 262 U.S. 447, 480:

Sutherland, J.:

> "The effect of this [Art. III, sec. 2] is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant."

(Denying original jurisdiction of an action by Massachusetts against the Secretary of the Treasury to enjoin enforcement of the Maternity Act on the ground that Congress had usurped the reserved powers of the States, this being held to be a political rather than a judicial question.)*

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* Existence of a justiciable controversy requiring the Court's original jurisdiction was found also in the following cases:

Texas v. *White*, 7 Wall. 700, 719—

Where Texas sued to enjoin individuals from receiving payment from the United States of bonds of which Texas claimed ownership.

Florida v. *Anderson*, 91 U.S. 667—

Where Florida, as holder of railroad bonds creating lien on railroad property, sued to enjoin individuals from interfering with

A suit against an individual to collect a tax clearly presents a justiciable controversy determinable "according to accepted doctrines of the common law or equity systems of jurisprudence."

United States v. *Chamberlin*, 219 U.S. 250, 258:

Hughes, C.J.:

> "If the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action must be regarded as well brought.
>
> "At common law, customs duties were recoverable by the Crown by an information in debt or an exchequer information in the nature of a bill in equity for discovery and account. These informations rested upon the general principle 'that in the given case the common law or the statute creates a debt, charge, or duty

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the railroad property in such a manner as to hinder the State from applying it to payment of the bonds.

Alabama v. *Burr*, 115 U.S. 413—

Where Alabama sued the stockholders and officers of a railroad company for fraudulent procurance of the State's endorsement of its bonds.

Missouri v. *Illinois & Sanitary District of Chicago*, 180 U.S. 208—

Where Missouri sued to enjoin the discharge of sewage so as to pollute the Mississippi River in Missouri.

Kansas v. *Colorado*, 185 U.S. 125—

Where Kansas sued to enjoin the diversion of a river in Colorado, naturally flowing through Kansas territory.

Georgia v. *Tennessee Copper Co.*, 206 U.S. 230, 237—

Where Georgia sued to enjoin copper companies from discharging noxious gas from their works in an adjoining State over the plaintiff's territory.

Missouri v. *Holland*, 252 U.S. 416—

Where Missouri sued to enjoin a United States game warden from enforcing the Migratory Bird Treaty Act, asserting it threatened the State's right to regulate the taking of wild game within its borders.

Iowa v. *Illinois*, 147 U.S. 1;
Georgia v. *South Carolina*, 257 U.S. 516—

Where suits were brought to settle boundary disputes between the States.

in the party personally to pay the duties immediately upon the importation; and that, therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown.' *United States* v. *Lyman*, 1 Mason, p. 499. See also Comyn's Digest (Tit. 'Debt,' A, 9); Dunbury's Reports, *pp. 97, 223, 225, 262.''

Milwaukee County v. *M. E. White Co.*, 296 U.S. 268, 271:

Stone, J.:

"Even if the judgment [for an income tax] is deemed to be colored by the nature of the obligation whose validity it establishes and we are free to re-examine it and, if we find it to be based on an obligation penal in character, to refuse to enforce it outside the state where rendered, see *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 292, et seq.; compare *Fauntleroy* v. *Lum*, 210 U.S. 230, still the obligation to pay taxes is not penal. It is a statutory liability, *quasi*-contractual in nature, enforcible, if there is no exclusive statutory remedy, in the civil courts by the common law action of debt or *indebitatus assumpsit*. . . . This was the rule established in the English courts before the Declaration of Independence. . . ."

Accord:

Meredith v. *United States*, 13 Pet. 486.

Dollar Savings Bank v. *United States*, 19 Wall. 227.

United States v. *Philadelphia &c. R. Co.*, 123 U.S. 113.

So a judgment for a tax is one which is entitled to full faith and credit under the Constitution.

Milwaukee County v. *M. E. White Co.*, 296 U.S. 268.

The Massachusetts inheritance tax, upon its determination by the Commissioner and certification to the persons by whom it is payable, is due and payable, and provision is made for its enforcement by suit in the probate or the supreme judicial court (Appendix, *infra*, pp. 19-20). It therefore is "a statutory liability quasi contractual in nature," subject to enforcement by suit.

It remains to consider the possible bearing of the principle which has been adopted in some jurisdictions but denied in others that the courts of one State will not enforce the revenue laws of another State.

> III Beale, Conflict of Laws, sec. 610.1.
> *Milwaukee County* v. *M. E. White Co.*, 296 U.S. 268, 274, 275.

This rule was adopted in—

> *Moore* v. *Mitchell*, 28 Fed. (2) 997, aff'd 30 Fed. (2) 600 (C.C.A. 2) (affirmed on other grounds in 281 U.S. 18);
> *New York Trust Co.* v. *Island Oil & Transport Corp.*, 11 Fed. (2) 698 (C.C.A. 2);
> *Colorado* v. *Harbeck*, 232 N.Y. 71—

while disregarded in—

> *Holshouser Co.* v. *Gold Hill Copper Co.*, 138 N.C. 248.
> *Nashville Trust Co.* v. *Stokes* (Tenn.) 118 S.W. (2) 228 (decision of the Chancery Court of original jurisdiction, reversed on appeal on non-jurisdictional grounds, but sustained in part *sub nomine Curry* v. *McCanless* (U.S.), 83 Law. Ed. Ad. Op. 865).

The rule has been severely criticized—

29 Columbia L.R. 782;
48 Harvard L.R. 828—

and its validity is an open question in this Court.

Milwaukee County v. *M. E. White Co.*, 296 U.S. 268, 275:

Stone, J.:

"Whether one state must enforce the revenue laws of another remains an open question in this Court."

Moore v. *Mitchell*, 281 U.S. 18, 24:

Butler, J.:

"It is not necessary to express any opinion upon the question considered below; whether a federal court in one State will enforce the revenue laws of another State."

However sound the public policy may have been which gave rise to the rule in the courts of independent nations, its force is much attenuated as applied to the closely knit States of the Union and reaches the vanishing point when applied to the jurisdiction of this Court.

In *Moore* v. *Mitchell*, 30 Fed. (2) 600, 604 (C.C.A. 2), Judge Learned Hand justified the rule on the possible embarrassment of administering revenue laws of other States. Certainly this Court, with its nationwide jurisdiction over all the States, suffers from no such embarrassment. In its appellate jurisdiction it is constantly called upon to interpret and determine the validity of the taxing statutes of the various States.

The rule of *Wisconsin* v. *Pelican Insurance Company*, 127 U.S. 265, that this Court will not take original jurisdiction

of a suit by a State to enforce penal provisions of its laws should not be extended to a suit for enforcement of revenue laws. As the Court observed in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 271 (by Stone, J.), [illegible] "the obligation to pay taxes is not penal." (The context from which this quotation is taken is given *supra*, p. 10.)

We conclude, therefore, that the present case presents a controversy between a State and the citizens of another State of which this Court will take original jurisdiction.

II. There is presented a controversy between the Commonwealth of Massachusetts and the State of Missouri.

The allegations of the bill of complaint and of the return of the respondent State exhibit a justiciable controversy of a civil nature between the Commonwealth of Massachusetts and the State of Missouri.

The purpose of vesting in the Supreme Court original jurisdiction of controversies between two or more States was to provide a means for the settlement of disputes between States which, prior to their surrender of powers in the adoption of the Constitution, would have been settled by diplomacy or war.

Hans v. *Louisiana*, 134 U.S. 1, 15:

Bradley, J.:

> "Some things, undoubtedly, were made justiciable [by the Constitution] which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States."

Missouri v. *Illinois & Sanitary District of Chicago*, 180 U.S. 208, 241:

Shiras, J.:

"Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering."

And see—

Georgia v. *Tennessee Copper Co.*, 206 U.S. 230, 237.

The States as well as private individuals have sought a remedy against the manifest injustices of multiple taxation by invoking the due process clause of the Federal Constitution, but it now appears to be definitely established that there exists no Constitutional immunity against double taxation.

Curry v. *McCanless* (U.S.), 83 Law. Ed. Ad. Op. 865.

Graves v. *Elliott* (U.S.), 83 Law. Ed. Ad. Op. 880.

Worcester County Trust Co. v. *Riley*, 302 U.S. 292, 299.

New Jersey v. *Pennsylvania*, 287 U.S. 580.

And see—

"And Again Multiple Taxation?" (1938), 26 Georgetown L.J. 288, and

"Maguire versus Trefry Reclaimed" (1939), 29 Georgetown L.J. 281,

by Professor Francis C. Nash.

The States, therefore, having surrendered their rights to make treaties *inter se*, must find their only remedy against double taxation in reciprocal legislation.

First National Bank of Boston v. *Maine*, 284 U.S. 312, 334:

Stone, J. (dissenting; Holmes and Brandeis, JJ., concurring):

> ". . . Even if it be assumed that some protection from multiple taxation, which the Constitution has failed to provide, is desirable, and that this Court is free to supply it, that result would seem more likely to be attained, without injustice to the states, by familiar types of reciprocal state legislation, than by stretching the due process clause to cover this case. See 28 Columbia L. Rev. 806; 43 Harvard L. Rev. 641. . . ."

Kidd v. *Alabama*, 188 U.S. 730, 732:

Holmes, J.:

> "No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

Both Massachusetts and Missouri have resorted to this expedient.

Missouri has enacted reciprocal legislation under which is exempted from taxation the transfer of intangibles where the transferor at the time of death was a resident

of a State which at that time did not impose a transfer or death tax in respect of intangible property of residents of other States or if the laws of the State of residence contained a reciprocal exemption provision (Missouri Rev. Stats. 1929, c. 1, art. 21, sec. 576 (Bill, pp. 9-11, par. 10)).

Massachusetts in the past has had various reciprocity statutes,* but since 1927 (St. 1927, c. 156) it has granted complete exemption from the inheritance tax to intangible property not belonging to its inhabitants (Mass. General Laws [Ter. Ed.] c. 65, § 1, Appendix hereto, p. 19).

Massachusetts and its residents, therefore, are entitled to the immunity offered by the Missouri statute.

A controversy has now arisen between Massachusetts and Missouri over the enforcement of these reciprocal provisions.

An inhabitant of Massachusetts has died leaving incorporeal property, subject to its inheritance tax, located in Missouri. Missouri not only resists the right of Massachusetts to enforce its tax, but, in complete disregard of its own reciprocity law, seeks to impose its own tax upon this property of a Massachusetts decedent. The bill avers that "the State of Missouri intends to exercise its jurisdiction over the Trustees and the trust property within its jurisdiction, to subject such persons and property to its own succession tax, to the exclusion of the complainant and of the taxes of the complainant" (Bill, p. 14, par. 17). Its conduct is analogous to violation of a treaty between independent States.

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* St. 1907, c. 563, sec. 3, partial reciprocity.
St. 1909, c. 490, pt. II, sec. 1, partial reciprocity.
St. 1912, c. 678, complete exemption.
St. 1916, c. 268, complete exemption.
St. 1920, c. 396, partial reciprocity.
St. 1922, c. 403, sec. 3, partial reciprocity.
St. 1925, c. 338, sec. 1, complete reciprocity.
St. 1927, c. 156, complete exemption.

If the evils of multiple taxation are to be solved by reciprocal legislation of the States, as this Court has itself suggested, it is essential that the States have a forum where they can compel recalcitrant States to observe the reciprocity their legislatures have provided. The Supreme Court is the only available forum.

Massachusetts, to whom the tax is owed, has a proprietary interest in its collection; this embraces a proprietary interest in the enforcement of the reciprocal provisions of the law of Missouri, whose unlawful exactions would diminish the taxable estate, and as a result the amount of the Massachusetts tax.

A decision by this Court binding upon the State of the situs would have a salutary effect in solving the problem of multiple taxation. States of the situs would be readier to assist the domiciliary States in the enforcement of the latters' tax laws, and trustees holding such property in their possession would find it more difficult to escape their just obligations.

We conclude, therefore, that the present case presents a controversy between two States of which this Court will take original jurisdiction.

III. If the Court has jurisdiction upon either ground but not the other, the jurisdiction is not lost because of the joinder of parties not necessary to such jurisdiction.

In *Texas* v. *Florida* [decided March 13, 1939], 83 Law. Ed. Ad. Op. 549, 553, which was a controversy between States to which the sole beneficiary of the decedent's estate was joined as a party, the Court held:

Stone, J.:

"The present suit is between states, and the other jurisdictional requirements being satisfied, the indi-

vidual parties whose presence is necessary or proper for the determination of the case or controversy between the states are properly made parties defendant. Cf. *United States* v. *West Virginia*, 295 U.S. 463, 470" (where a similar situation was presented).

Certainly the State of Missouri is a proper, if not a necessary, party to this controversy. It ought to have an opportunity to present the facts as well as its arguments to the Court, and it ought to be bound by such decree as this Court may make.

In the present case, moreover, all of the respondents yield to the Court's jurisdiction and none raises any issue of misjoinder.

Respectfully submitted,
For the Commonwealth of Massachusetts,
PAUL A. DEVER,
Attorney General,
EDWARD O. PROCTOR,
Assistant Attorney General.

Appendix.

Material Provisions of the Massachusetts Statutes.

Massachusetts General Laws [Tercentenary Edition] c. 65, sec. 1:

"All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, *belonging to inhabitants of the commonwealth*, . . . which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his death . . . shall be subject to a tax [etc.]: . . ."

Sec. 6:

"Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor . . . shall be liable for the taxes imposed by this chapter, with interest, until the same have been paid."

Sec. 7:

"Taxes imposed by this chapter upon property or interests therein, passing by deed, grant or gift to take effect in possession or enjoyment after the death of the grantor or donor . . . shall be payable by the grantee or donee at the expiration of one year [from the date] . . . when his right of possession or enjoyment accrues."

Sec. 27:

"The commissioner shall determine the amount of tax due and payable upon any estate or any part thereof and shall certify the amount so due and payable to the

persons by whom the tax is payable. . . ." (Provision is made for abatement by petition in equity in the probate court.)

Sec. 30:

"The probate court having jurisdiction of the settlement of the estate of the decedent shall, subject to appeal as in other cases, hear and determine all questions relative to the tax imposed by this chapter, . . . and the commissioner shall represent the commonwealth in any such proceedings. If the court finds that any tax remains due, it shall order the executor, administrator or trustee to pay the same, with interest and costs, and execution shall be awarded against the goods and estate of the deceased in the hands of the executor, administrator or trustee . . ."

Sec. 32:

"The commissioner shall commence proceedings for the recovery of any of the taxes imposed by this chapter . . . within six months after the same become payable; . . ."

Sec. 33:

"Taxes imposed by this chapter . . . may be recovered by the commissioner in an action of contract brought in the name of the commonwealth, or by an information in equity brought in the supreme judicial court by the attorney general at the relation of the commissioner. . . ."

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. ..., ORIGINAL.

COMMONWEALTH OF MASSACHUSETTS, *Complainant*

vs.

STATE OF MISSOURI, ET AL., *Respondents.*

RETURN OF RESPONDENT, STATE OF MISSOURI, TO RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT.

ROY McKITTRICK,
Attorney General of Missouri,
EDWARD H. MILLER,
Assistant Attorney General of Missouri,
COUNSEL FOR RESPONDENT, STATE OF MISSOURI.

Supreme Court of the United States

OCTOBER TERM, 1938.

NO. ...., ORIGINAL.

COMMONWEALTH OF MASSACHUSETTS, *Complainant,*

vs.

STATE OF MISSOURI, ET AL., *Respondents.*

APPLICATION OF RESPONDENT, STATE OF MISSOURI, FOR LEAVE TO FILE RETURN TO RULE TO SHOW CAUSE.

Now comes the State of Missouri and respectfully asks leave to file, out of time, its annexed return, as Respondent, to the Rule to show cause why leave should not be granted to the Commonwealth of Massachusetts to file its Bill of Complaint herein.

ROY McKITTRICK,
Attorney General of Missouri,

EDWARD H. MILLER,
Assistant Attorney General of Missouri.

COUNSEL FOR RESPONDENT,
STATE OF MISSOURI.

Supreme Court of the United States

OCTOBER TERM, 1938.

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RETURN OF RESPONDENT, STATE OF MISSOURI, TO RULE TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO FILE BILL OF COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the State of Missouri, Respondent in the bill of complaint proposed to be filed in the above entitled cause, and for its return to the rule of this Honorable Court, entered November 7, 1938, ordering Respondent, the State of Missouri, to show cause why leave should not be granted Complainant, the Commonwealth of Massachusetts, to file its bill of complaint, respectfully states as follows:

1. Respondent, the State of Missouri, avers that Complainant, the Commonwealth of Massachusetts, has no constitutional jurisdiction or right to impose transfer, succession, or inheritance taxes with respect to the transfers referred to in Paragraphs 3, 4 and 5 of the bill of complaint of Complainant, the Commonwealth of Massachusetts; but, on the contrary and in direct contradiction to the claim of Complainant, the Commonwealth of Massachusetts, Respondent, the State of

Missouri, asserts that it has the sole and exclusive jurisdiction and right to impose transfer, succession, or inheritance taxes with respect to said transfers; in the alternative, that whether the Complainant has or has not jurisdiction to impose such taxes, Respondent, the State of Missouri, has jurisdiction to impose its taxes with respect to such transfers.

2. Respondent, the State of Missouri, further avers that it proposes to assess and collect such taxes, if exigible, with respect to said transfers, and to that end has, through its duly authorized officers, taken such action as is required by statute.

3. Respondent, the State of Missouri, further avers that as there is no court having complete jurisdiction over the parties and over the subject-matter, other than this Honorable Court, Respondent, the State of Missouri, yields to the jurisdiction of this Honorable Court.

4. Respondent, the State of Missouri, further avers that it is in the public interest that an early adjudication be had which will be final and binding upon all parties interested.

5. Respondent, the State of Missouri, further avers that it has no cause to show why leave should not be granted to Complainant, the Commonwealth of Massachusetts, to file its bill of complaint herein.

ROY McKITTRICK,
Attorney General of Missouri,

EDWARD H. MILLER,
Assistant Attorney-General of Missouri,

COUNSEL FOR RESPONDENT,
STATE OF MISSOURI.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

COMMONWEALTH OF MASSACHUSETTS,
Complainant,
vs.
STATE OF MISSOURI et al.,
Respondents.

No. .....
Original.

RETURN

Of Respondent, St. Louis Union Trust Company, Trustee, and of Respondents, St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees, to Rule to Show Cause Why Leave Should Not Be Granted to File Bill of Complaint.

CHARLES M. ROGERSON,
DANIEL N. KIRBY and
HARRY W. KROEGER,
Solicitors for Respondents, St. Louis Union Trust Company, Trustee, and St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees.

ABBOTT, DREW, ROGERSON & CARR,
NAGEL, KIRBY, ORRICK & SHEPLEY,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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RETURN

Of Respondent, St. Louis Union Trust Company, Trustee, and of Respondents, St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees, to Rule to Show Cause Why Leave Should Not Be Granted to File Bill of Complaint.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

St. Louis Union Trust Company, Trustee under indenture of trust made February 14, 1921, by Madge Barney Blake, St. Louis Union Trust Company, Trustee under indenture of trust made January 11, 1929, by Madge Barney Blake, and St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees under indenture

of trust made May 20, 1935, by Madge Barney Blake, being parties named as respondents in the Bill of Complaint proposed to be filed in the above-entitled cause, for their return to the rule of this Honorable Court entered November 7, 1938, ordering respondents to show cause why leave should not be granted the complainant, the Commonwealth of Massachusetts, to file its Bill of Complaint, respectfully state as follows:

1. Respondents aver that the proposed Bill of Complaint raises substantial issues as to:

(a) Whether the complainant, the Commonwealth of Massachusetts, has, upon the death of one of its residents, jurisdiction to levy and assess legacy and succession taxes with respect to intangible personal property which was transferred by that resident while a resident of said Commonwealth many years prior to her death, to Trustees in Missouri, and which at the time of such death was owned, held and being administered by such Trustees in Missouri, and, if the complainant has such jurisdiction with respect to property transferred upon trusts which the decedent transferor could have revoked during her life, whether it has such jurisdiction with respect to property transferred upon complete and irrevocable trust.

(b) Whether the complainant, the Commonwealth of Massachusetts, can assert such jurisdiction with respect to such transfers in trust, or any of them, consistently with the Constitution of the United States or any of the Amendments thereto.

(c) Whether the complainant, the Commonwealth of Massachusetts, being unable to levy its said tax with respect to said transfers or to reduce to judgment its claim for such tax with respect thereto because neither the property transferred nor the persons own-

ing it are within the reach of its process, has a right to establish its claim for such tax in this or any other Court and to obtain a judgment therefor and to obtain judicial process to enable it to collect such judgment.

2. These respondents further aver that the Bill of Complaint does not set forth a cause of action cognizable either at law or in equity as against these respondents for the following reasons:

(a) That upon the allegations set forth in the Bill of Complaint it appears that the complainant, the Commonwealth of Massachusetts, has no jurisdiction upon the death of Madge Barney Blake, one of its residents, to levy, assess or collect legacy and succession taxes with respect to the intangible personal property which was transferred by her many years prior to her death to these respondents, as Trustees, in Missouri, and which at the time of her death was owned, held and being administered by these respondents, as Trustees,—that is to say, no jurisdiction exists either with respect to the property transferred upon revocable trust or that transferred upon irrevocable trust.

(b) That upon the allegations set forth in the Bill of Complaint it appears that the complainant, the Commonwealth of Massachusetts, cannot assert such jurisdiction to tax the intangible personal property which was transferred by said Madge Barney Blake to the respondents, as Trustees, in Missouri, and which at the time of her death was owned, held and being administered by respondents in Missouri, because such asserted jurisdiction is in violation of the Constitution of the United States and the Amendments thereto, particularly the Fourteenth Amendment.

(c) That upon the allegations set forth in the Bill

of Complaint it appears that at the time of the death of said Madge Barney Blake, the legal title to, and the possession, management and control of, the intangible personal property transferred was vested in these respondents, as Trustees, and was beyond the constitutional jurisdiction of complainant, the Commonwealth of Massachusetts.

(d) That upon the allegations contained in the Bill of Complaint it appears that the complainant, the Commonwealth of Massachusetts, being unable to levy or collect a legacy or succession tax upon the death of Madge Barney Blake with respect to the intangible property transferred by her to these respondents, as Trustees, or to reduce its claim for such taxes to judgment, because neither the property transferred nor the persons owning it are within the reach of its process, has no right to establish its claim for such tax in this or any other Court or to obtain a judgment therefor or to obtain judicial process to enable it to collect such judgment.

(e) That upon the allegations set forth in the Bill of Complaint it appears that the assertion by the complainant, the Commonwealth of Massachusetts, of a right to establish and enforce its said tax, is an assertion of extra-territorial rights and in violation of the Constitution of the United States and the Amendments thereto.

3. These respondents state that they have no cause to show why leave should not be granted to complainant, the Commonwealth of Massachusetts, to file its Bill of Complaint herein, but, on the contrary, join in the prayer that such leave be granted to the end that all issues raised by the Bill, including legal contentions as to whether a cause

of action is the. by stated, be fully adjudicated by this Honorable Court.

Respectfully submitted,

CHARLES M. ROGERSON,
DANIEL N. KIRBY and
HARRY W. KROEGER,
Solicitors for Respondents, St. Louis Union Trust Company, Trustee, and St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees.

ABBOTT, DREW, ROGERSON & CARR,
NAGEL, KIRBY, ORRICK & SHEPLEY,
Of Counsel.

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CLERK

Supreme Court of the United States

OCTOBER TERM 1939

No. ORIGINAL

THE COMMONWEALTH OF MASSACHUSETTS,
Complainant,

v.

THE STATE OF MISSOURI ET AL.,
Respondents.

BRIEF FOR RESPONDENT THE STATE OF MISSOURI ON THE JURISDICTION OF THE COURT.

ROY MCKITTRICK,
Attorney General of the
State of Missouri.

EDWARD H. MILLER,
Counsel for Respondent
State of Missouri.

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THE STATE OF MISSOURI ET AL.,
Respondents.

BRIEF FOR RESPONDENT THE STATE OF MISSOURI ON THE JURISDICTION OF THE COURT.

STATEMENT OF THE CASE.

This is an original proceeding instituted by the Commonwealth of Massachusetts against the State of Missouri, and three citizens of Missouri as trustees of *inter vivos* trusts created by a decedent who died domiciled in Massachusetts. The trustees all reside in Missouri, and the trust assets are now and have been continuously there. The trust instruments provide for gifts over, after the death of the settlor, to residents of both Missouri and Massachusetts. The Bill of Complaint alleges that both Massachusetts and Missouri claim the right to levy their respective inheritance taxes on

the transfers, and prays that the Court will determine which of the States can, consistently with the Constitution of the United States, rightfully levy such taxes.

The details in connection with these primary facts are set out in the pleadings, and counsel for the State of Missouri have undertaken a statement of the case only to call attention to two matters, one a conclusion in the Massachusetts statement of the case, and the other an explanation of the inconsistency between Missouri's pleading and its brief.

In the brief for the Commonwealth of Massachusetts, counsel say on page 3 that Missouri "intends to exercise its jurisdiction over the trustees and the property, to the exclusion of Massachusetts and its claim." The Bill of Complaint does so allege (p. 14), but the Return of Missouri to the Court's Rule to Show Cause does not indicate any intent to act so as to interfere with the efforts of Massachusetts to collect a tax from the trustees. Missouri has pleaded in the alternative, denying the jurisdiction of Massachusetts to tax, but averring that whether Massachusetts has or has not jurisdiction to tax, the State of Missouri has the right to impose its taxes (pp. 3-4). Obviously this alternative position was taken so as to assert Missouri's right to tax, whether the Court should declare that only one or that both States could levy their taxes. In the event of the latter declaration, the Missouri pleading suggests the plain inference that Missouri has no quarrel with the right of Massachusetts to tax, in the event both States may tax. And in the other alternative, Missouri's hostility to the Massachusetts tax would only be manifested by the weapon of legal argument, and not be restrictive or coercive control over the trustees or the trust *res*. That is all the Massachusetts allegation, even in the absence of the Missouri Return, can properly be construed to mean.

There is, however, a complete variance between the position taken by the State of Missouri in its pleading on the jurisdictional question, and its position in this brief on that question. Responding to the Court's Rule to Show Cause

why leave should not be granted to file the Bill, Missouri stated that it had no cause to show.

In October of 1938, when Massachusetts instituted this proceeding, Massachusetts asked this Court to declare that it had jurisdiction to tax these transfers, because such right was then in doubt. The situation has changed since then. That both States have the constitutional right to tax transfers such as these has now been settled by decisions of this Court. *Curry* v. *McCanless*, 307 U. S. 357 (1939); *Graves* v. *Elliott*, 307 U. S. 383 (1939). Since the right of Massachusetts to levy its taxes is now already established, Massachusetts no longer needs the only relief asked for in its Bill of Complaint. And that the Court does not propose to consider the merits of the case at this time is made plain in its Order of June 5, 1939, limiting the argument "to the question whether this Court has jurisdiction to entertain the suit."

Under these circumstances Missouri conceives its duty to lie in an adversary argument on the jurisdictional question. The Court has announced its duty to inquire into its own jurisdiction whether the jurisdiction is questioned by the parties or not, *Texas* v. *Florida*, 306 U. S. 398 (1939), and since the Bill could have been dismissed summarily because of no cause of action stated, *Alabama* v. *Arizona*, 291 U. S. 286 (1934), or on the theory that the case had become moot, *Mills* v. *Green*, 159 U. S. 651 (1895), *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466 (1916), Missouri assumes that the Court desires to hear argument on both sides of the jurisdictional question, regardless of the position heretofore taken in the pleadings.

That jurisdiction is determined in the light of the facts and situation existing at the date of the institution of the suit seems clear. *Texas* v. *Florida*, *supra*; Cf. *Clark* v. *Wooster*, 119 U. S. 322 (1886); *Rice & Adams Corporation* v. *Lathrop*, 278 U. S. 509 (1929). Thus this brief will treat the jurisdictional question from the point of view of the

situation existing at the date of the institution of the suit, when the Commonwealth of Massachusetts was asking this Court, as the sole relief prayed for, to determine an important, doubtful question of constitutional law, namely, whether Massachusetts or Missouri had the right to impose its State inheritance taxes with respect to the transfers described in the Bill of Complaint.

SUMMARY OF ARGUMENT.

The Court cannot take jurisdiction, as no justiciable case or controversy to which the judicial power is extended under the Constitution, is presented, but rather a request for an opinion, on a political aspect of sovereignty. The States named as parties are not true adversary parties in the required sense, and no cause of equitable cognizance is stated in the Bill of Complaint. If a controversy does exist between Massachusetts and certain Missouri citizens, indispensable parties respondent are lacking, whose joinder would oust the Court's jurisdiction.

Even if the Court could take jurisdiction, it need not do so. Certain kinds of cases have been carved out of the general proposition that a court has no discretion to decline to exercise a conferred jurisdiction, and constitutional and statutory provisions relevant to the grant of original jurisdiction are neither all-comprehensive nor mandatory. And if the Court may decline to exercise its jurisdiction, it should so decline here. This is not the type of case for which the grant of original jurisdiction was designed, and the interested parties have other entirely adequate remedies in other courts.

ARGUMENT.

I.

The Court Cannot Take Jurisdiction, as This Proceeding is Outside the Judicial Power.

Article III, section 2 of the Constitution of the United States provides in part as follows:

Clause 1.

> The judicial Power shall extend * * * to Controversies between two or more States;—between a State and Citizens of another State;

Clause 2.

> In all Cases * * * in which a State shall be Party, the supreme Court shall have original Jurisdiction.

Section 233 of the Judicial Code provides in part as follows:

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. * * * (Mar. 3, 1911, c. 231, §233, 36 Stat. 1156; 28 U. S. C. A. §341.)

A more detailed analysis of these provisions will be reserved until a later part of this brief. It will suffice for the present to note that clause 1 confers the judicial power, and that clause 2 merely distributes the power conferred under Clause 1. *Pennsylvania* v. *Quicksilver Company*, 10 Wall. 553 (1871); *California* v. *Southern Pacific Company*, 157 U. S. 229 (1895); *Louisiana* v. *Texas*, 176 U. S. 1 (1900). Section 233 of the Judicial Code, which is substantially a reenactment of section 13 of the Judiciary Act of 1789 (Sept. 24, 1789, c. 20, § 13, 1 Stat. 80), divides the original jurisdiction conferred on the Supreme Court into

exclusive and non-exclusive jurisdiction, and performs the additional function, by virtue of its differences of phraseology, of assisting in the construction of the constitutional language, as they were almost contemporaneous and probably drafted by the same hands. *Ames* v. *Kansas*, 111 U. S. 449 (1884); *Louisiana* v. *Texas*, *supra*; Cf. *Williams* v. *United States*, 289 U. S. 553 (1933). Of course, the statute could not alter the constitutional assignment of jurisdiction, *Marbury* v. *Madison*, 1 Cr. 137 (1803), much less the grant of judicial power, and therefore the first inquiry will be whether or not the case at bar can qualify as a proceeding to which the judicial power of the United States extends. For it so to qualify (A) it must be a justiciable "case" or "controversy"; (B) it must be a "case" or "controversy" between States, or (C) between a State and citizens of other States, with no citizens of the complaining State indispensable parties respondent; and (D) since it is a suit in equity, it must state a case of equitable cognizance. The Bill of Complaint certainly does not meet all of these essential requirements, and perhaps it can be established that it does not meet any of them.

A. *There is no justiciable "case" or "controversy."*

Clause 1 of Article III, section 2 of the Constitution extends the judicial power to "controversies," while clause 2 distributes the power in terms of "cases." The Judicial Code uses only the word "controversies." This difference of words probably does not, however, imply a distinction:

> The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.
>
> *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 239 (1937).

For the purpose of this argument the attack on the bill as not stating a case or controversy will therefore be con-

fined to a demonstration that the bill does not state a justiciable controversy. See *Marbury* v. *Madison*, *supra*; *Muskrat* v. *United States*, 219 U. S. 346 (1911).

(1) *A request for an opinion does not present a case or controversy.*

The prayer in the Bill of Complaint is contained in paragraphs 20, 21 and 22 (pp. 15-16). Paragraph 21 prays only for the issuance of process, and paragraph 22 is a general, formal prayer for "other, further, different and additional relief." Paragraph 21 embraces the only demand for specific relief:

> * * * that this Court may determine, declare and adjudge whether the complainant, the Commonwealth of Massachusetts, or the respondent, the State of Missouri, has the jurisdiction and lawful right to impose transfer, succession or inheritance taxes in respect of said several transfers under the facts and circumstances herein presented, and may determine, declare and adjudge that the complainant has the right and jurisdiction to impose such taxes in respect of all said transfers.

It is difficult to distinguish this prayer from that in the case of *United States* v. *West Virginia*, 295 U. S. 463 (1935), in which the United States asked for a declaration of its right to control the use of a river which it alleged to be navigable and which the respondent State claimed to be non-navigable. The Court said:

> At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable * * *. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 259. Until the right asserted is threatened with invasion by acts of the State, which serve both to de-

> fine the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court. 295 U. S. 473-474.

In *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158 (1922), the State of Texas asked the Court to declare unconstitutional certain portions of the Transportation Act of 1920, to annul action taken thereunder with respect to Texas railroads, and for an injunction to restrain any further action with respect to such carriers. The Court concluded that Texas was asking it to determine a question of legislative power, namely, whether the Congress had the right to enact this legislation or whether the power over the subject matter was reserved to the States. The Court said that the bill presented an "abstract question of legislative power":

> Obviously, this part of the bill does not present a case or controversy within the range of the judicial power as defined by the Constitution. It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power. 258 U. S. 162.

To the same effect is *New Jersey* v. *Sargent*, 269 U. S. 328 (1926), where the State of New Jersey asked the Court to declare whether New Jersey or the Congress had legislative jurisdiction over certain waters.

In *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), Massachusetts asked that the enforcement of the Maternity Act be enjoined as beyond the power of Congress and an invasion of the State's right of sovereignty. The Court said:

> In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract

questions of political power, of sovereignty, of government. 262 U. S. 484-485.

In each of these four cases a sovereign or quasi-sovereign filed an original bill in this Court asking the Court to determine whether complainant or another sovereign or quasi-sovereign named as respondent (or with its officials named as respondents) had the power under the Constitution to do certain things. In each case the Court held that the proceeding did not present a case or controversy within the judicial power. Massachusetts is likewise only asking for a declaration of whether it as the state of domicile, or Missouri as the state of physical situs and residence of legal title-holders, has the right to levy an inheritance tax, and "this Court may not be called on to give advisory opinions or to pronounce declaratory judgments." *Alabama* v. *Arizona, supra,* 291 U. S. 286, 291 (1934). "The judicial power does not extend to the determination of abstract questions." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324 (1936). "This Court cannot issue declaratory decrees." *Arizona* v. *California,* 283 U. S. 423, 464 (1931).

In *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923), a suit to enjoin the enforcement of a West Virginia statute cutting off interstate commerce in West Virginia natural gas, although the Court did take jurisdiction, Mr. Justice Brandeis delivered a strong dissent in the court of which he said:

> The bills present neither a "case" nor a "controversy," within the meaning of the Federal Constitution. *Marbury* v. *Madison,* 1 Cr. 137; *Muskrat* v. *United States,* 219 U. S. 346, 356, 359; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158. They are not proceedings "instituted according to the regular course of judicial procedure" to protect some right of property or personal right. They are, like *McCord* v. *Louisville & Nashville R. R. Co.,* 183 U. S. 483, 495, an attempt to enjoin, not executive action, but legisla-

> tion. They are instituted frankly to secure from this Court a general declaration that the West Virginia Act of February 17, 1919, is unconstitutional. Compare *Giles* v. *Harris*, 189 U. S. 475, 486. The well settled rule that the Court is without power to entertain such a proceeding applies equally, whether the party invoking its aid is a State or a private person. And the rule cannot be overcome by giving to pleadings the form of a bill in equity for an injunction. 262 U. S. 610-611.

That the Commonwealth of Massachusetts is also frankly attempting to secure from this Court a declaration that its taxing power extends to the transfers in question and that the taxing power of the State of Missouri does not so extend is apparent from its prayer for relief. It appears to be willing to stand solely on its right to an opinion from this Court on a question of sovereign power, and that this Court will not furnish such an opinion, in a suit instituted by a State for the sole purpose of obtaining it, seems no longer open to question.

(2) *The supposed dispute is political and therefore not justiciable.*

In spite of the intimation of Mr. Justice Washington in *Fowler* v. *Lindsey*, 3 Dall. 410, 413 (1799), that he could see no reason why a State could not sue in equity "for such an incorporeal right as that of sovereignty and jurisdiction," the law has since that time become well settled to the contrary. Sovereignty and jurisdiction of a State are admittedly political questions, and political questions are not justiciable. *Virginia* v. *West Virginia*, 11 Wall. 39, (1871).

In *Georgia* v. *Stanton*, 6 Wall. 50 (1868), an original bill in equity sought to restrain the enforcement in Georgia of the Reconstruction Acts. The Court said:

> * * * [That] the prayers for relief, call for the judgment of the Court upon political questions, and, upon

> rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the Court. 6 Wall. 77.

Likewise the Court considered that the Commonwealth of Massachusetts was asking for the determination of a political question in *Massachusetts* v. *Mellon, supra.* And in *Kansas* v. *Colorado,* 185 U. S. 125, 141 (1902). the Court suggested that controversies between States "susceptible of adjustment, and not purely political in their nature," were made justiciable by the Constitution.

There is no better established jurisdiction in controversies between States than the jurisdiction of the Court to settle boundary disputes, but it was vigorously asserted at first that a boundary dispute was a political question and therefore not justiciable. Mr. Chief Justice Taney in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 752 (1838), rested his dissent on that proposition and said:

> Contests for rights of sovereignty and jurisdiction between States over any particular territory, are not, in my judgment, the subjects of judicial cognizance and control, to be recovered and enforced in an ordinary suit; and are, therefore, not within the grant of judicial power contained in the Constitution. 12 Pet. 753.

He argued further that the bill of Rhode Island was to protect and enforce the "mere political jurisdiction" of the State, a function which he did not consider as belonging to the Courts. And that the majority of the Court shared the view of the Chief Justice that if sovereignty and jurisdiction had been the primary questions to be determined in

a boundary case, the Court would have had no jurisdiction, because of these questions being political in their nature, and that the Chief Justice differed from the majority of the Court only on the question of whether sovereignty and jurisdiction were dependent and ancillary questions with relation to the main, factual question of the boundary line, or whether they were the primary questions, is indicated by the majority opinion, in which Mr. Justice Baldwin said:

> The locality of that [boundary] line is a matter of fact. * * * Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, * * *. So that great as questions of jurisdiction and sovereignty may be, they depend in this case on two simple facts. 12 Pet. 733-734.

Thus the jurisdiction of the Court over boundary disputes only became settled by an acceptance of the premise that a complainant State in a boundary dispute is only seeking the determination of a fact, namely, the boundary line, with sovereignty and jurisdiction on its side of that boundary line as strictly collateral and incidental. By such a test the bill of complaint in the case at bar cannot stand, for it is purely state sovereignty and jurisdiction, the sovereignty and jurisdiction to tax, which the Commonwealth of Massachusetts has asked this Court to determine. Indeed, in the Bill of Complaint it is asserted that jurisdiction to tax is the "primary issue" in the case (p. 15, par. 19). No question of fact is involved, for none of the facts alleged in the Bill of Complaint are disputed, except perhaps the allegation that Missouri proposes to tax to the exclusion of Massachusetts, which is negatived by the alternative plea in Missouri's Return. And in this respect the case differs also from *Texas* v. *Florida, supra*, where the complainant, as in the boundary dispute cases, asked the Court to determine a fact.

B. *There is no case or controversy between States.*

Even if a justiciable controversy is presented, to which the judicial power of the United States extends, this Court's jurisdiction does not attach unless the controversy is between two or more States, or between a State and citizens of other States. First, an attempt will be made to show that the Bill does not present a controversy between two States, and then, under point IC, that it does not present a controversy between a State and citizens of other States. Unless a controversy between at least one of these two sets of adversary parties is presented, this Court cannot take jurisdiction.

(1) *There is no direct conflict of interests between the States.*

According to the Bill of Complaint, the trust assets which Massachusetts seeks to subject to the payment of its inheritance taxes had a market value as of the date of the filing of the Bill of almost two million dollars. Massachusetts claims inheritance taxes in the amount of $137,000, and alleges that Missouri claims inheritance taxes in the amount of approximately $182,000. Maximum federal estate taxes are alleged to be approximately $69,000 (p. 9). It is thus evident that the trust assets are far more than adequate for the payment of the total taxes claimed by both Massachusetts and Missouri. There is, therefore, no question such as was presented in *Texas* v. *Florida, supra,* of adverse claims for taxes in an amount which if collected would deplete the estate to a point which would not leave sufficient assets for the payment of the taxes alleged by complainant to be collectible by it. A comparison of the bill in *Texas* v. *Florida, supra,* with the bill which Texas had previously asked leave to file against the same States, for the same relief, leave to file being denied, *Texas* v. *New York et al.,* 300 U. S. 642 (1937), indicates that this fact was decisive on the jurisdictional issue, as perhaps it

was in the Court's declining to take original jurisdiction in one phase of the Dorrance litigation, *New Jersey* v. *Pennsylvania*, 287 U. S. 580 (1933).

Massachusetts asserts that the respondent trustees who have possession and control of the trust assets are in Missouri and beyond the reach of the process of the courts of Massachusetts. But this does not present a controversy of any kind between the two States. Whether Missouri has or has not the right to tax the transfer in question, and whether Missouri does or does not levy and collect the taxes, will neither assist nor deter the Commonwealth of Massachusetts in the collection of the taxes which it claims it has the right to collect. Missouri cannot compel the trustees to subject themselves to the reach of process issuing out of the Massachusetts courts, and in fact it is a matter of indifference to Missouri whether the trustees can be reached by such process or not. In the last analysis the claims of Massachusetts and Missouri are completely independent, are not mutually exclusive in any way, and Missouri has not done and does not propose to do any act which would tend to interfere with the collection by Massachusetts of its asserted tax. Thus there is no real controversy of any kind between the States.

In *Muskrat* v. *United States*, *supra*, 219 U. S. 346 (1911), the decision turned squarely on an absence of adversary parties. The United States wanted to have the validity of certain Acts of Congress relating to Indian lands determined, and the Congress authorized the bringing of suits in the Court of Claims against the United States, with a right of appeal to the Supreme Court. This Court held that the Court of Claims was without jurisdiction to entertain the suit, on the ground that, as the position of the United States was not adverse to that of the claimant, there was no real controversy:

> The term [case] implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. 219 U. S. 357.

(2) *Missouri is not threatening any private or property right of Massachusetts.*

Even if there were a direct conflict or controversy between the States, and if Missouri were threatening to invade in some manner some right of the Commonwealth of Massachusetts, or more specifically, if Missouri by attempting to collect its inheritance taxes with respect to these transfers were interfering with the collection by Massachusetts of its inheritance taxes, it would not seem that such a conflict would present a justiciable controversy between the two States, because the Court has declared that only certain types of state rights will be protected from threatened invasion.

In *Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Company*, 220 U. S. 277 (1911), the State of Oklahoma sought to enjoin the charging of certain freight rates alleged to be discriminatory. The Court said that if the State's contention were to be sustained,

> • • • [then] the Constitution when conferring *original* jurisdiction on this Court "in all cases • • • *in which a State is a party*" (Art. III, § 1), intended to include any and every judicial proceeding of whatever nature which the State may choose to institute, in this court, for the purpose of enforcing its laws, although the State may have no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws. 220 U. S. 286.

And in *Georgia* v. *Stanton*, *supra*, 6 Wall. 50, 77 (1868), the Court dismissed the bill because "no case of private rights or private property infringed, or in danger of actual or threatened infringement" was presented.

In *United States* v. *West Virginia*, *supra*, 295 U. S. 463 (1935), this requirement is more plainly illustrated. The Court said:

> At the outset, it should be noted that the bill • • • neither asks the protection nor alleges the invasion of

> any property right. • • • there is no allegation of any interference by the State, actual or threatened, with any land or property. 295 U. S. 471.

An analysis of that case shows that it turns on the question of an invasion of an actual property right of the United States, as distinguished from an invasion of the general sovereignty of the United States over the particular river in question. The right to tax is an attribute of general sovereignty, as distinguished from a property right. *McCulloch* v. *Maryland*, 4 Wheat. 316, 428 (1819); *The Providence Bank* v. *Billings*, 4 Pet. 514, 564 (1830); *Case of the State Freight Tax*, 15 Wall. 232, 278 (1872); *Cooley on Taxation*, 3rd Ed., p. 7. Thus, even if the Missouri tax threatened in some way the jurisdiction of Massachusetts to tax, such an invasion would not be of a private or property right of Massachusetts, and therefore could not present a justiciable controversy. While the property right requirement has been relaxed in water rights cases so as to permit a State to sue as *parens patriae*, *Missouri* v. *Illinois*, 180 U. S. 208 (1901); *Kansas* v. *Colorado*, 185 U. S. 125 (1902), the water rights cases present no analogy to the case at bar.

(3) *Massachusetts is not the real party in interest.*

As noted above in *Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Co.*, 220 U. S. 277 (1911), that a State may file a proceeding in this Court as complainant, does not without more present a justiciable controversy within the Court's jurisdiction.

> Yet, notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens • • •.
>
> *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 287 (1888).

The fact that the Bill may appear on its face to present a justiciable controversy is not sufficient: "In determining whether this litigation presents a case * * * we are concerned, not with form, but with substance." *Nashville, Chattanooga & St. Louis Railway Co.* v. *Wallace*, 288 U. S. 249, 259 (1933).

This principle is neatly illustrated in the case of *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 220 U. S. 290 (1911), in which the bill sought to enjoin the transportation into Oklahoma of intoxicating liquors. The bill was denominated a bill in equity and asked for equitable relief. And the case turned on the question of whether the suit was of a civil nature so as to come within section 233 of the Judicial Code. Mr. Justice Harlan said that it was evident that the object of the suit was to prevent the violation of Oklahoma's criminal laws, and the bill was dismissed for want of jurisdiction with the following statement:

> Of such a suit this Court cannot take original cognizance, although the suit is in form of a civil nature. 220 U. S. 298.

These cases demonstrate that the Court will inquire into the substance and real object of the suit, regardless of the form the pleadings take, and if Massachusetts is not the real party in interest, the Court has the duty of so declaring, and of declining to take jurisdiction even though the Constitution gives it jurisdiction "In all Cases * * * in which a State shall be Party, * * *" (Art. III, sec. 2, clause 2), because this language, as construed, means that the State must be, not nominally a party, but the real party in interest as complainant. In *Oklahoma* v. *Atchison, Topeka and Santa Fe Railway Co., supra*, the Court said:

> We are of the opinion that the words, in the Constitution, conferring original jurisdiction in this Court, in a suit "in which a State shall be a party," are not to be interpreted as conferring such jurisdiction in every

cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally. 220 U. S. 289.

Not many years after the Civil War the idea was conceived of evading the Eleventh Amendment, and of collecting on State bonds by the device of a suit between States in this Court. In *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76 (1883), the Court declared that one State cannot create a controversy with another State within the meaning of that term as used in the Constitution by assuming the prosecution of debts owing by another State to its citizens. *Kansas* v. *United States*, 204 U. S. 331 (1907). See *Florida* v. *Anderson*, 91 U. S. 667 (1875).

In *Louisiana* v. *Texas*, *supra*, 176 U. S. 1 (1900), a somewhat less obvious illustration of this principle came before the Court. Louisiana sought to enjoin the enforcement of Texas quarantine laws, alleging that the Texas quarantine was being enforced in such a way as to discriminate against Louisiana commerce. The Court held that Louisiana was not the real party in interest in the suit, but rather that its citizens whose trade and commerce were injured were the real parties in interest, and therefore that the original jurisdiction of the Court could not be invoked.

A striking illustration of the principle is found in *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923), in which a bill was filed to enjoin further use of drainage ditches alleged to be injuring property in North Dakota by overflowing into the State. Damage was alleged to both public and private property. The Court said that a justiciable controversy was presented insofar as the North Dakota public property was concerned, but that insofar as relief was asked for the benefit of individuals in North Dakota whose property had been damaged, the bill did not present a justiciable controversy.

It is evident from the earlier analysis of Massachusetts' prayer for relief that Massachusetts is not the real party in interest in this proceeding. This is not a suit to collect Massachusetts inheritance taxes, for no such relief is prayed for in the bill. The prayer is for a determination as to whether Massachusetts or Missouri has the right to assess and collect taxes, but as has been demonstrated above, it makes no difference to Missouri whether Massachusetts collects its Massachusetts inheritance taxes or not, and by the same token it makes no difference to Massachusetts whether Missouri collects its taxes or not. The only real parties in interest, who would be in any way affected by the collection of the Missouri tax, are the persons whose property will be used to pay that tax. (Of course, Massachusetts cannot say that the possibility that in a Missouri case the Court will say no other state can tax, entitles Massachusetts to contest the proceeding.) Thus it is evident that the beneficiaries under the trust instruments, either individually or through their representative trustees, are the only persons who are really interested in whether Missouri taxes or not, and Massachusetts cannot invoke the original jurisdiction of this Court by filing a bill as complainant which has as its object the determination of their tax liability.

C. *If there is a separate controversy between a State and citizens of another State, necessary parties are absent, whose joinder would oust the jurisdiction.*

California v. *Southern Pacific Company, supra*, 157 U. S. 228 (1895), involved title to real estate, and the Court came to the conclusion that citizens of California were necessary parties, in whose absence as parties the litigation could not proceed. The Court, to dispose of any attempt to amend the bill, pointed out that the joinder of California citizens as parties defendant would oust the jurisdiction of the Court, and came to the conclusion that the bill must be dismissed. To the same effect is *Arizona* v. *California*,

298 U. S. 558 (1936). See also the dissent of Mr. Chief Justice White in *South Dakota* v. *North Carolina*, 192 U. S. 286, 322 (1904), and the dissent of Mr. Justice Brandeis in *Pennsylvania* v. *West Virginia*, *supra*, 262 U. S. 553, 605 (1923). Thus, in the case at bar, if a citizen of Massachusetts should be a necessary party respondent, the Court must decline to take jurisdiction, even if it should find that a justiciable controversy between Massachusetts and the trustees, or Massachusetts and Missouri, is presented.

It has already been pointed out that the beneficiaries under the trust instrument are the only persons really interested in the issue framed by Massachusetts. They are the only persons whose property rights will be affected by the determination of the question which Massachusetts asks the Court to determine. An examination of the three trust indentures attached to the Bill of Complaint and incorporated in the Bill by reference will show that in each of the three indentures citizens of Massachusetts are beneficiaries. An examination of the terms of the indentures will also show that in the 1921 indenture the trust became substantially a dry trust on the death of the settlor and that the only act remaining to be performed by the trustee with respect to the bulk of the estate, is to distribute legacies to beneficiaries, including these Massachusetts citizens. A determination of the tax with respect to the interests of these Massachusetts citizens should not be made unless they are to have their day in court. As appears from the face of the Bill it would make a substantial difference to them whether Massachusetts or Missouri should be allowed to impose its taxes (if only one of them were to be so allowed), because the asserted Missouri tax is approximately $182,000, while the asserted Massachusetts tax is $137,000, and obviously it would make a great deal of difference to these beneficiaries in the event the Court should decide, looking at the situation as it existed when the proceeding was instituted, that both States have the right to impose their taxes.

Furthermore, the Court in these original proceedings has adhered to a rather broader rule about giving interested parties their day in court than may have been applied in connection with the doctrine of necessary or indispensable parties in strictly private litigation. For example, in *Texas* v. *Interstate Commerce Commission, supra,* 258 U. S. 158 (1922), a suit to nullify parts of the Transportation Act of 1920 as applied to Texas carriers, the Court declined to take jurisdiction and had this to say as to the parties respondent, only the Commission and the Railroad Labor Board being named as such parties in the bill:

> The bill makes it plain that the carriers and employees have put the Board's decisions into effect and have adjusted their relations on that basis. There are none to whom the controversy would be of such immediate concern as to them; * * * Their interests would be directly and unavoidably affected. They are not parties to the bill; nor do any of those who are parties represent them. The Board does not claim to do so; and the attitude of the State is antagonistic to them. To take up and solve the controversy without their presence and without their being represented would be quite inadmissible, considering the exceptional nature of our original jurisdiction. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 245. If their citizenship be such that they cannot be brought into the suit consistently with the limitations on our original jurisdiction, this does not justify us in proceeding in their absence. The cases just cited leave no doubt on this point. 258 U. S. 163.

In *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199 (1902), the same attitude was evidenced. That was a suit for an injunction restraining the defendant, a New Jersey corporation, from effecting a consolidation of the Great Northern Railway Company and the Northern Pacific Railway Company, both Minnesota corporations. The Court held that the suit could not be entertained without additional parties, saying that the minority stockholders had a

right to have their interests represented in the controversy by the companies whose stock they held, and that the companies had the duty of protecting the public's interest, which the State was hardly in a position to represent. The Court said:

> Even a State, when it voluntarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy. 184 U. S. 246.

D. *The allegations afford no adequate basis for relief according to accepted doctrines of equity jurisprudence.*

That the constitutional authority of this Court in original proceedings is dependent on the statement in the bill of complaint of a cause of action which can be classified, if the bill is in equity, as a recognized and established type of equity case, was announced by the Court in *Texas* v. *Florida, supra*, 306 U. S. 398 (1939). It is evident that the Massachusetts Bill represents an effort to qualify it as a bill in the nature of interpleader. However, a comparison between the Massachusetts Bill of Complaint here, and the Texas Bill of Complaint in *Texas* v. *Florida, supra*, demonstrates very plainly certain fundamental differences between the two.

While in a strict bill of interpleader the risk of loss which prompts a court of equity to take jurisdiction is a risk to the complainant as a stakeholder, in that he may be called upon to pay the same debt twice, the only risk of loss to a complainant in a bill in the nature of interpleader is that he as a complainant may have his claim defeated or diminished by "the independent prosecution of rival but mutually exclusive claims." 306 U. S. 407. The Court in *Texas* v. *Florida, supra*, declared that "the risk that decedent's estate might constitutionally be subjected to conflicting tax assessments in excess of its total value and that the right of complainant or some other state to collect the tax might thus be defeated was a real one" and noted that the equity jurisdiction was "founded on avoidance of the risk

of loss resulting from the threatened prosecution of multiple claims." 306 U. S. 410.

It has already been pointed out that the tax claims of Missouri and Massachusetts are not mutually exclusive. Even if it could be assumed that *Curry* v. *McCanless, supra*, 307 U. S. 357 (1939), announced a rule of law differing from the law as it existed at the time of the institution of this proceeding, and that the Constitution, under the interpretation then in effect, prevented more than one State from assessing inheritance taxes on a single transfer, even then Massachusetts was faced with no possible risk of loss from anything that Missouri might do. If Missouri did levy its tax and this Court had later said that it had a right so to do, and that it was the only State which had that right, the levying of the tax by Missouri would have interfered with no right which Massachusetts had. In other words, the only effect of the Missouri tax would have been to prevent Massachusetts from levying a tax which by hypothesis it had no right to levy. If on the other hand, still assuming that the law was that only one State could tax, this Court had subsequently declared that the Missouri tax as assessed was unconstitutional and that Massachusetts had the sole right to levy the tax, then again Massachusetts ran no risk because the Missouri tax was attempted. And as developments have actually occurred, the Court has declared that both States have the right to levy their respective taxes, so if this third and only remaining hypothesis were accepted as existing law at the date of the institution of the proceedings, here also Massachusetts could run no risk because of any action which the taxing authorities of Missouri might take, because the assets in the hands of the trustees had a market value several times the amount of the combined taxes claimed by the two States. Thus the most essential requirement of a bill in the nature of interpleader, a real risk of loss to the complainant, is negatived by the pleadings, under every possible theory of the law on the date of the filing of the bill.

That Massachusetts has an adequate remedy at law will be discussed under Point III C.

Missouri's counsel have been unable to discover any other kind of case of equitable cognizance under which this case could be classified and thus, under the doctrine announced in *Texas* v. *Florida, supra,* this proceeding cannot be one to which the judicial power extends, and the Court must decline to take jurisdiction.

II.

Even if the Court Has Jurisdiction it May Decline to Exercise it.

A. *Courts need not in every case exercise a jurisdiction which they admittedly possess.*

In *Cohens* v. *Virginia,* 6 Wheat. 264 (1821), Mr. Chief Justice Marshall said

> It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. 6 Wheat. 404.

Similar expressions are found in subsequent cases, *Second Employers' Liability Cases,* 223 U. S. 1, 58 (1912), particularly in connection with federal courts attempting to abandon jurisdiction in favor of state courts, *Hyde* v. *Stone,* 20 How. 170 (1858); *Chicot County* v. *Sherwood,* 148 U. S. 529 (1893); *McClellan* v. *Carland,* 217 U. S. 268 (1910).

However, despite these broad statements, there are a number of cases in which this Court has said that exceptions may be carved out of the general rule, and in which the Court has squarely held that federal courts may in their discretion decline to exercise a jurisdiction admittedly possessed.

One of these exceptions involves admiralty cases between foreigners. Although Article III, section 2 of the Constitution extends the judicial power "to all Cases of admiralty and maritime Jurisdiction" and although section 24, as amended, of the Judicial Code (28 U. S. C. A. § 41 (3)), vests in district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction", it is well settled that in suits in admiralty between foreigners the district courts may in their discretion decline to retain jurisdiction. *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932).

Rogers v. *Guaranty Trust Company of New York*, 288 U. S. 123 (1933), represents another type of case in which the exercise of jurisdiction in discretionary. That case held that a federal court may properly decline to interfere with or control the internal affairs of a corporation organized under the laws of another State. And in *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935), it was held that a district court in a receivership case should exercise its discretion and allow State banking authorities to liquidate a bank under State statutes, rather than to carry out the liquidation through the vehicle of a federal receivership, under a jurisdiction which the court admittedly had.

In *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, *supra*, Mr. Justice Brandeis said:

> Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interests of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more properly be conducted in a foreign tribunal. 245. U. S. 422.

And in *Rogers* v. *Guaranty Trust Company of New York*, *supra*, Mr. Justice Butler said:

> While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. 288 U. S. 130.

Cf. *Douglas* v. *New York, New Haven, & Hartford R. R. Co.*, 279 U. S. 377 (1929), which apparently overrules the *Second Employers' Liability Cases* (*Mondou* v. *New York*) 223 U. S. 1 (1912), which had held that a state court must take jurisdiction of an action brought under the Federal Employers' Liability Act.

Although the case at bar is neither a suit in admiralty between foreigners, nor a suit involving the internal affairs of a corporation, or the liquidation of a state bank, these cases do stand for the proposition that this Court may announce in what cases a federal court may decline to exercise a jurisdiction vested in it by the Constitution or the Congress. This Court must be the final arbiter of the kinds of cases in which jurisdiction may be declined, and it has as much right to declare that jurisdiction may be declined in certain cases where States are parties, as where foreigners are parties.

B. *The Constitutional provision conferring jurisdiction in controversies between States, and between States and citizens of other States, is not mandatory.*

Article III, section 2, clause 1, of the Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III, section 2, clause 2 of the Constitution provides as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It has already been observed that clause 2 does not purport to confer any judicial power, but merely to distribute the judicial power conferred under clause 1. *Pennsylvania* v. *Quicksilver Co., supra,* 10 Wall. 553 (1871).

And section 233 of the Judicial Code of 1911 provides as follows:

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party.[1]

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[1] Section 233 of the Judicial Code (28 U. S. C. A., sec. 341, Mar. 3, 1911, c. 231, sec. 233, 36 Stat. 1156) was a reenactment without change of section 687 of the Revised Statutes of 1878. There are minor variations between this language and the language of section 13 of the Judiciary Act of 1789 (Sept. 24, 1789, c. 20, sec. 13, 1 Stat. 80). See *Ames* v. *Kansas, supra,* 111 U. S. 449, 463 (1884); *United States* v. *Louisiana,* 123 U. S. 32 (1887); Hughes, *Federal Practice,* sec. 3021n.

No amendment of the original Judiciary Act provision has been discovered, and the original language more clearly defines the jurisdiction as follows:

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, ex-

If the language of the Judiciary Act can properly be used as a contemporaneous interpretation of the constitutional provisions, *Ames* v. *Kansas, supra,* 111 U. S. 449 (1884), it would seem that "all" controversies where a State is a party, the language of the Statute, would have required the reading of the word "all" into the constitutional provision of clause 1 dealing with controversies between States, especially since clause 2 apparently distributes to the Supreme Court jurisdiction in "all" cases in which a State is a party. However, the Court has declined to accept that interpretation, has said that the omission in clause 1 of the word "all" was apparently deliberate, and intended to be a contrast between the classes of cases in clause 1 which are preceded by the word "all", and thus that the judicial power does not extend to all controversies to which the United States is a party, or to all controversies between two or more States, or to all controversies between a State and citizens of another State, but rather only to certain types of those controversies. *Williams* v. *United States, supra,* 289 U. S. 553 (1933). Cf. *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry. Co., supra,* 220 U. S. 290 (1911).

Not only has the Court declared that the grant of judicial power does not comprehend all controversies between two or more States, or between a State and citizens of other States; it has gone further and has interpreted the constitutional language in such a way that the interpolation of phrases is necessary for an understanding of its scope. And it has read into the constitutional language certain cases not even mentioned. *United States* v. *Texas,* 143

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cept between a state and its citizens; and except also between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul, shall be a party.

U. S. 621 (1892). It would be particularly difficult to understand Section 2 of Article III or Section 233 of the Judicial Code without a examination of the cases, for the words of section 233 would indicate a jurisdiction considerably different from the jurisdiction which the Court has declared is embraced by its language.

There is no indication either in the constitutional provisions or the Judicial Code that they would not be equally applicable to suits in which States are defendants, as to suits in which States are plaintiffs. In fact, in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), the Court held that it made no difference whether a State was a plaintiff or a defendant. However, even in the absence of the Eleventh Amendment, *Chisholm* v. *Georgia* would probably not be decided that way today, for the Court has approved Mr. Justice Iredell's dissent in that case, and has declared that the doctrine of the implied immunity of a sovereign from suit must be read into the constitutional language, and that its literal construction is inadmissible. *William* v. *United States, supra; Hans* v. *Louisiana*, 134 U. S. 1, (1890).

The last two cases cited involved suits by citizens against sovereigns. The Court has also read into the constitutional provision a prohibition against suits by a foreign State against a State:

> Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent.
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> *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934). Cf. *Oklahoma* v. *Gulf, Colorado & Santa Fe Railway Co., supra*, 220 U. S. 290 (1911).

In fact, in *Williams* v. *United States, supra,* the Court said that the phrase "Controversies to which the United States shall be a Party" in Article III, section 2, clause I, which it placed upon precisely the same footing as the clause "Controversies between two or more States",

> • • • must be construed, in accordance with the practical construction put upon it by the first Judiciary Act, as though it read, "controversies to which the United States shall be a party plaintiff or petitioner." 289 U. S. 577.

The same principle has been given an even broader application. In *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 289 (1888), the Court said:

> The grant is of "judicial power", and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all.

Cf. *Missouri* v. *Illinois, supra,* 180 U. S. 208 (1901).

It is interesting to note that the Court has grafted a further exception upon the exception that suits which were not justiciable prior to the Constitution were not made justiciable by the Constitution. In *Hans* v. *Louisiana, supra,* the Court said:

> The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines • • •. 134 U. S. 15.

It is also interesting to observe that the interpretation of the Constitution and Judiciary Act as differentiating, although the language itself suggests no such differentiation,

between suits by a State or the United States, and suits against a State or the United States, was arrived at even although in the very language of the Judiciary Act, an express distinction is made between suits by ambassadors and other foreign representatives, and suits against them.

If the language of the Constitution and the Judiciary Act were taken literally in connection with controversies between, for example, a State and citizens of other States, it would appear to authorize the Supreme Court to take jurisdiction in every case where a State and citizens of other States are adversary parties. The Court has, however, interpreted this language so that the grant of power is only considered as extending to justiciable cases or controversies, of a civil nature, in which a State as plaintiff or petitioner sues only citizens of other States. Thus if the Court can read into the language of the Constitution certain exceptions which are perhaps not directly suggested by its terms, but which are derived from postulates beyond the confines of the Constitution, it would appear to be at liberty to decline to exercise jurisdiction in this case, on grounds equally compelling, and on postulates equally beyond the confines of the constitutional and statutory language. Cf. the dissenting opinion of Mr. Chief Justice Fuller in *United States* v. *Texas, supra,* 143 U. S. 621, 648 (1892).

III.

If the Court Has Discretion to Decline to Exercise Jurisdiction it Should Decline to Exercise it in This Case.

A. *The spirit in which interstate litigation should be approached:*

Admittedly the case at bar is not one in which the actualities of the problem which Massachusetts is attempting to present to the Court would be mutilated by the litigous process. Compare the dissenting opinions of Mr. Justice Frankfurter in *Texas* v. *Florida, supra,* 306 U. S. 398, 428 (1939) and of Mr. Chief Justice Taney in *Pennsylvania* v.

Wheeling Bridge Co., 13 How. 518, 579 (1852). Admittedly also the fact that there may not have been heretofore presented to this Court a case precisely like the case at bar is probably immaterial. *Arizona* v. *California*, 292 U. S. 341 (1934). And there is no reason to suppose that if the Court should decide to take jurisdiction there would be any difficulty about the terms or enforcement of a decree, a problem presented in *Kentucky* v. *Dennison*, 24 How. 66 (1861), and *Mississippi* v. *Johnson*, 4 Wall. 475 (1867), suggested in *Virginia* v. *West Virginia*, 246 U. S. 565, (1918), and urged as a reason for declining to take jurisdiction by Mr. Justice Brandeis in his dissenting opinion in *Pennsylvania* v. *West Virginia, supra*, 262 U. S. 553, 605 (1923).

However, this Court has frequently expressed its grave sense of responsibility in connection with interstate conflicts. In *Louisiana* v. *Texas, supra*, 176 U. S. 1, 15 (1900), the Court said:

> But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.

And in *Alabama* v. *Arizona*, 291 U. S. 286, 291, (1934), the Court said that

> Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity.

In *New York* v. *New Jersey*, 256 U. S. 296, 309, (1921), the Court said:

> • • • the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.

To the same effect are *North Dakota* v. *Minnesota, supra,* 263 U. S. 365 (1923); *Connecticut* v. *Massachusetts,* 282 U. S. 660 (1931); *Washington* v. *Oregon,* 297 U. S. 517 (1936).

In these original proceedings the Court has in several cases, in arguments on the jurisdiction alone, declined to take jurisdiction because of no cause of action stated on the merits.

North Dakota v. *Chicago & Northwestern Railway Co.,* 257 U. S. 485 (1922), was instituted by a bill in equity to restrain the defendant railroad companies from applying an order of the Interstate Commerce Commission increasing intrastate rates in North Dakota, until the Supreme Court of the United States had had an opportunity of reviewing the order of the Commission. The defendants questioned the jurisdiction of the Court on the grounds that the United States was not a party, that the United States by statute must be a party to a suit to enjoin an order of the Commission, and that the United States had only consented to be sued in such cases in the district courts. The State's contention was that if it had a substantial right which was being infringed, it had an absolute right under the Constitution to bring this bill in the Supreme Court, a right which could not be taken away by an act of Congress. Mr. Justice Holmes said that even granting the States' premises it did not follow that the bill could be maintained since, the bill being in equity, "the requirements of justice and public policy must be taken into account." 257 U. S. 490. He suggested that there was no doubt that the State could sue in the district court, naming the United States as a party (thus disposing of any question that the case was not one to which the judicial power did actually extend) and that in any event the State would be adequately protected by the right of appeal.

In *Oklahoma* v. *Cook,* 304 U. S. 387 (1938), the Court denied leave to file a bill of complaint, suggesting that if jurisdiction were taken of the suit, an enormous number

of other similar cases against citizens of other States might be brought. Cf. *California* v. *Latimer*, 305 U. S. 255 (1938).

These cases consistently carry out the admonition in *California* v. *Southern Pacific Co.*, *supra*, an admonition which epitomizes the proper approach to the problem of original jurisdiction:

> The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. 157 U. S. 261.

B. *This proceeding is not of the kind for which the original jurisdiction of this Court was designed.*

Counsel will not burden the Court with a discussion of the historical development of interstate controversies. From the early days of Colonial disputes, *Penn* v. *Lord Baltimore*, 1 Ves. 444 (1750), through the provisions of the Articles of Confederation, the Constitutional Convention, and the debates on ratification, the story has already adequately been told. *Rhode Island* v. *Massachusetts*, *supra*, 12 Pet. 657 (1838); *Louisiana* v. *Texas*, *supra*, 176 U. S. 1 (1900); *Missouri* v. *Illinois*, *supra*, 180 U. S. 208 (1901); *South Dakota* v. *North Carolina*, *supra*, 192 U. S. 286 (1904); *Virginia* v. *West Virginia*, 206 U. S. 290 (1907), 246 U. S. 565 (1918); Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale Law Journal 685; William C. Coleman, *The State as Defendant under the Federal Constitution*, 31 Harvard Law Review 210. The Court may, however, be interested in a summary classification of the fifty-eight interstate controversies which have been presented to the Court and have been the subject of court opinions.[3]

Most numerous are the cases involving boundary disputes, totalling thirty-three. No question of jurisdiction was raised in the first of these, *New York* v. *Connecticut*, 4

[3] See James Brown Scott, *Judicial Settlement of Controversies between States of the American Union*, Oxford University Press (1918), Oxford at the Clarendon Press (1919).

Dall. 1, 3, 6 (1799). After the jurisdictional problem had been thoroughly argued and settled in *Rhode Island* v. *Massachusetts, supra,* 12 Pet. 657 (1838), upon the theory that boundary disputes were suits asking for a factual determination, with sovereignty and jurisdiction only incidental questions, a conclusion which was reached over Mr. Chief Justice Taney's vigorous dissent, the jurisdictional question was apparently considered settled and has hardly been mentioned in any of the subsequent boundary dispute cases, a list of which is incorporated in the Appendix.

The second most numerous class of cases are those involving the interstate flow of water. These cases number fourteen. Some complain of the flow, as of a trespass or nuisance, such as *Missouri* v. *Illinois, supra,* 180 U. S. 208 (1901), in which the jurisdiction of the Court for this class of case was first vigorously contested and settled.[3] Others, such as *Kansas* v. *Colorado, supra,* 185 U. S. 125 (1902), complain of an interference with the flow. A list of these cases is incorporated in the Appendix.

A third class are cases involving contractual obligations of States. There are only five of these, three of them being suits on State bonds, *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana, supra,* 108 U. S. 76 (1883), and *South Dakota* v. *North Carolina, supra,* 192 U. S. 286 (1904); one a suit to settle the apportionment of a public debt growing out of the separation of West Virginia from Virginia, *Virginia* v. *West Virginia, supra,* 206 U. S. 290 (1907); and the fifth, *Kentucky* v. *Indiana,* 281 U. S. 163 (1930), involving a State contract to build an interstate bridge.

The fourth class of cases are those in which a State has sought to restrain proceedings under the laws of another

[3] The first case of this class was *South Carolina* v. *Georgia,* 93 U. S. 4 (1876), in which, as in the first boundary case, no question was raised as to the Court's jurisdiction. The parallel between the two classes of cases continued, in that after the jurisdictional issue was once thoroughly considered and disposed of in the second case filed, the later cases generally accepted as a matter of course the jurisdiction of the Court over the subject matter.

State. There are only four of these. *Louisiana* v. *Texas*, *supra*, 176 U. S. 1 (1900), sought to restrain executive action, in the administration of admittedly valid quarantine laws. *Iowa* v. *Slimmer et al.*,* 248 U. S. 115 (1918), sought to restrain judicial proceedings under admittedly valid probate laws. *Pennsylvania* v. *West Virginia*, *supra*, 262 U. S. 553 (1923), and *Alabama* v. *Arizona*, *supra*, 291 U. S. 286 (1934), attempted to block State legislation, although *Pennsylvania* v. *West Virginia*, *supra*, might more properly be classed with the cases of physical diversion under class two above, differing principally from those cases, insofar as subject matter is concerned, only in the commodity diverted.

The two remaining cases would not seem to fit in any classification, one of them, *Arizona* v. *California*, 292 U. S. 341 (1934), being a bill to perpetuate testimony, and the other, *Texas* v. *Florida*, *supra*, 306 U. S. 398 (1939), being a suit for the determination of the fact of domicile.

From all of these interstate controversy cases there emerge two suggested reasons for the jurisdiction of the Court over interstate controversies. The case at bar does not come within either of these two reasons. One is that because the Constitution deprived the States of their sovereign right to adjust their controversies with other sovereigns by diplomacy, or, that failing, by war, it was necessary to provide in the constitutional scheme some tribunal to which these controversies could be carried. *Missouri* v. *Illinois*, *supra*, 180 U. S. 208 (1901), *North Dakota* v. *Minnesota*, *supra*, 263 U. S. 365 (1923). And the principle of some cases being intended to be made justiciable which would not have been justiciable prior to the Constitution is to be confined to this type of controversy. *Hans* v. *Louisiana*, *supra*, 134 U. S. 1 (1890). The second reason for giving this Court jurisdiction, particularly of suits between a State and citizens of other States, was to avoid the supposed partiality

* Perhaps more properly designated *Iowa* v. *Minnesota*, because the State of Minnesota was a party defendant.

of the courts of the State whose citizens might be sued there by another State. *Wisconsin* v. *Pelican Ins. Co., supra,* 127 U. S. 265 (1888). That proposition would not be applicable in the case at bar if the trustees have their remedy in a State or Federal district court, as will be discussed below, and in any event, regardless of the forum or parties, it is not proper to make the assumption that state or local federal courts will make findings dictated solely by financial advantages to the locality. See Mr. Justice Frankfurter's dissent in *Texas* v. *Florida, supra.* If the presumption of judicial fairness and impartiality is to be made even in the presence of a temptation of financial advantage, *a fortiori* it must be made where no financial advantage can accrue or no disadvantage result from the Court's action, as in the case at bar where it is a matter of indifference to Missouri whether the Massachusetts tax is assessed or not, and *vice versa.*

C. *There are other entirely adequate remedies available to the interested parties.*

Although there are ample precedents for the proposition that a court does not take jurisdiction merely because there is no other court which could afford a remedy, *California* v. *Southern Pacific Co., supra,* 157 U. S. 229 (1895), it seems plain that there are other remedies in other courts which are entirely adequate to dispose of any possible differences between the parties interested in this case.

In the first place, it would seem that Massachusetts should be able to bring a suit against the trustees for the collection of its taxes, in either a Missouri state court or in a Federal district court in Missouri. That such a suit would be of a civil nature and would present a justiciable case or controversy was settled by the decision in *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268 (1935). Admittedly that case did not decide that such a suit could be brought in a state court on a tax before it was reduced to judgment, but

the language of the opinion would certainly admit the construction that such a suit could be brought.

Under the Massachusetts statute the Missouri trustees and beneficiaries are made liable for the payment of the Massachusetts tax. Massachusetts General Laws (Tercentenary Edition 1932) c. 65, sec. 6. It is hardly to be assumed that the trustees would make transfers to the beneficiaries without attempting to get their liability for the Massachusetts tax adjudicated, and that such a possibility can be taken into account by the Court in determining whether or not to take jurisdiction was expressed in *Alabama* v. *Arizona, supra,* where the Court suggests that the bill fails to show

> * * * that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company, that apparently is directly concerned, or by a seller of such goods. 291 U. S. 292.

See also the suggestion in *California* v. *Latimer, supra,* where the Court says:

> For aught that appears prompt payment of the tax and claim of refund would have led to an early determination of the liability here contested. 305 U. S. 262.

There is no question about the remedies available for a testing of the validity of the Missouri tax. The trustees could sue to enjoin the collection of the Missouri tax on the ground that it is unconstitutional as applied to them, *Ex parte Young,* 209 U. S. 123 (1908). The trustees could bring an action under the Missouri Declaratory Judgment Act, Laws of Missouri 1935, pp. 218-220.[5] And in the Mis-

[5] Section 1. The Circuit Courts and Courts of Common Pleas of this State, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. * * * The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

souri inheritance tax laws there is a special section permitting persons interested in their liability for an inheritance tax to bring suit against the State to quiet title, to the bringing of which suit the State expressly consents. Revised Statutes of Missouri, 1929, sec. 598.[6]

Although *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937), held that an adjudication of this kind could not be obtained in an interpleader suit in which the officials of States were named as defendants, because such a suit would violate the Eleventh Amendment, that persons in the dilemma of these trustees and beneficiaries could find other adequate remedies was demonstrated in the cases of *Curry* v. *McCanless, supra*, 307 U. S. 357 (1939), and *Graves* v. *Elliott, supra*, 307 U. S. 383 (1939).

The Massachusetts statutes provide that the State Tax Commissioner may proceed to assess the Massachusetts inheritance taxes, and any interested person is given the right to appeal from the Commissioner's determination.[7] Pre-

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Section 2. Any person interested * * * whose rights, status or other legal relations are affected by a statute, * * * may have determined any question of construction or validity arising under the * * * statute * * * and obtain a declaration of rights, status, or other legal relations thereunder.

[6] Section 598. Actions may be brought against the State for the purpose of quieting the title to any property, against the lien or claim of lien of any tax or taxes under this article, or for the purpose of having it determined that any property is not subject to any lien for taxes under this article. In any such action, the plaintiffs may be any administrator, or executor * * * or trustee * * * or distributee * * *.

[7] General Laws of Massachusetts (Tercentenary Edition, 1932), c. 65, sec. 25. The value of the property upon which the tax is computed shall be determined by the commissioner and notified by him to the persons by whom the tax is payable, and such determination shall be final unless the value so determined shall be reduced by proceedings as herein provided. At any time within three months after such determination, any party interested in the succession, or the executor, administrator or trustee, may appeal from the decision to the board of tax appeals. Said board shall appraise such property at its value as of the date of the death of the decedent, shall give notice of its decision to the commissioner and to the ap-

sumably the trustees and beneficiaries, particularly the beneficiaries who are residents of Massachusetts, would not permit such a determination to stand against them even if they considered it temporarily uncollectable, when they are given by the statute an adequate opportunity of a judicial review. The trustees and beneficiaries thus have ample opportunities to contest the Massachusetts tax.

If this case does present a real controversy between the States it is certainly a controversy which should be susceptible of amicable adjustment. In fact, in the case of *Louisiana* v. *Texas, supra,* 176 U. S. 1 (1900), this Court suggested that where it appeared from the record that no attempt had been made at amicable adjustment, an inference existed that there was no real controversy between the States. That this Court favors the amicable settlement of disputes has been pointed out on numerous occasions. *Washington* v. *Oregon,* 214 U. S. 205 (1909); *Minnesota* v. *Wisconsin,* 252 U. S. 272 (1920); *New York* v. *New Jersey, supra,* 256 U. S. 296 (1921). And Mr. Justice Holmes in making such a suggestion in *Virginia* v. *West Virginia,* 220 U. S. 1 (1911), said:

> * * * This case is one that calls for forbearance upon both sides. Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end. 220 U. S. 36.

See also Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale Law Journal 685.

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pellant, and shall make return thereof to the probate court. Such return, when accepted by said court, shall be final except that any party aggrieved by such appraisal shall have an appeal on matters of law.

CONCLUSION.

Counsel for the State of Missouri have attempted to demonstrate that the Court has no jurisdiction, that even if it has jurisdiction, it need not exercise it, and that if it need not exercise it, this is a case where it should not be exercised. Implicit in the whole argument is an attitude toward the function of this Court in our system of government. If, as counsel believe, its chief function is the decision of great causes, and the interpretation of the Constitution which determines the very existence of our system of government, then if the Court under the Constitution can reasonably be spared the harassments of a *nisi prius* court in small causes, it should be spared them. If Mr. Chief Justice Marshall's statement that where the jurisdiction is based on the character of the parties, the nature of the case is nothing, *Cohens* v. *Virginia*, were literally followed, what would prevent the State of Virginia from suing in this Court to collect every delinquent ten dollar tax judgment which transient residents had incurred, and moved away without paying? That such a suit would be justiciable seems hardly open to question. *South Dakota* v. *North Carolina; Milwaukee County* v. *M. E. White Co.;* Cf. *Texas* v. *Florida.* No suggestion is, of course, contemplated that the instant case is in any way comparable to the illustration, but a timely *caveat* to States as suitors might clarify a situation which is at present none too clear. No more cogent reason could exist for the declining of jurisdiction than a preservation of the Court for the major function for which it was designed, by the elimination from its jurisdiction of cases for which it was surely not designed.

It is respectfully submitted that the Motion for Leave to File the Bill of Complaint should be denied, and the cause dismissed.

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APPENDIX.

I. Boundary Disputes:

New York v. *Connecticut, et al.*, 4 Dall. 1, 3, 6, (1799);
New Jersey v. *New York*, 3 Pet. 461 (1830), 5 Pet. 284 (1831), 6 Pet. 323 (1832);
Rhode Island v. *Massachusetts*, 7 Pet. 651 (1833), 11 Pet. 226 (1837), 12 Pet. 657 (1838), 12 Pet. 755 (1838), 13 Pet. 23 (1839), 14 Pet. 210 (1840), 15 Pet. 233 (1844), 4 How. 591 (1846);
Missouri v. *Iowa*, 7 How. 660 (1849), 10 How. 1 (1851);
Florida v. *Georgia*, 11 How. 293 (1851), 17 How. 478 (1855);
Alabama v. *Georgia*, 23 How. 505 (1860);
Virginia v. *West Virginia*, 11 Wall. 39 (1871);
Missouri v. *Kentucky*, 11 Wall. 395 (1871);
Indiana v. *Kentucky*, 136 U. S. 479 (1890), 159 U. S. 275 (1895), 163 U. S. 520 (1896), 167 U. S. 270 (1897);
Nebraska v. *Iowa*, 143 U. S. 359 (1892), 145 U. S. 519 (1892);
Iowa v. *Illinois*, 147 U. S. 1 (1893), 151 U. S. 238 (1894), 202 U. S. 29 (1906);
Virginia v. *Tennessee*, 148 U. S. 503 (1893), 158 U. S. 267 (1895);
Missouri v. *Iowa*, 160 U. S. 688 (1896), 165 U. S. 118 (1897);
Tennessee v. *Virginia*, 177 U. S. 501 (1901), 190 U. S. 64 (1903);
Missouri v. *Nebraska*, 196 U. S. 23 (1904), 197 U. S. 577 (1905);
Louisiana v. *Mississippi*, 202 U. S. 1 (1906);
Washington v. *Oregon*, 211 U. S. 127 (1908), 214 U. S. 205 (1909);
Missouri v. *Kansas*, 213 U. S. 78 (1909);
Maryland v. *West Virginia*, 217 U. S. 1 (1910), 217 U. S. 577 (1910), 225 U. S. 1 (1912);
North Carolina v. *Tennessee*, 235 U. S. 1 (1914), 240 U. S. 652 (1916);
Arkansas v. *Tennessee*, 246 U. S. 158 (1918), 247 U. S. 461 (1916), 269 U. S. 152 (1925), 271 U. S. 629;

Arkansas v. *Mississippi*, 250 U. S. 39 (1919), 252 U. S. 344 (1920), 256 U. S. 28 (1921);
Minnesota v. *Wisconsin*, 252 U. S. 273 (1920), 254 U. S. 14 (1920), 258 U. S. 149 (1922);
Oklahoma v. *Texas*, 252 U. S. 372 (1920), 253 U. S. 465 (1920), 254 U. S. 280, 609, 615 (1920), 254 U. S. 603 (1921), 256 U. S. 70, 602 (1921), 257 U. S. 308, 609, 611, 616 (1921), 257 U. S. 621 (1922), 258 U. S. 574, 606 (1922), 259 U. S. 565 (1922), 260 U. S. 705 (1922), 260 U. S. 606, 711 (1923), 261 U. S. 340, 345, 606 (1923), 262 U. S. 505, 724 (1923), 263 U. S. 681 (1923), 264 U. S. 565 (1924), 265 U. S. 76, 490, 493, 500, 505, 513, 573 (1924), 266 U. S. 298, 303, 583 (1924), 266 U. S. 546 (1925), 267 U. S. 7, 452, 580, 582 (1925), 268 U. S. 252, 472, 675, 676, 678, 680 (1925), 269 U. S. 536 (1925), 269 U. S. 314, 539 (1926), 272 U. S. 21 (1926), 273 U. S. 93 (1927), 274 U. S. 713, 714 (1927);
Georgia v. *South Carolina*, 253 U. S. 477 (1920), 257 U. S. 516 (1922), 259 U. S. 572 (1922);
New Mexico v. *Texas*, 264 U. S. 574 (1924), 266 U. S. 586 (1924), 267 U. S. 583 (1925), 271 U. S. 650 (1926), 274 U. S. 716 (1927), 275 U. S. 279 (1927), 276 U. S. 557, 558 (1928), 283 U. S. 788 (1931), 51 S. Ct. 357 (1931);
Louisiana v. *Mississippi*, 268 U. S. 678 (1925), 282 U. S. 458 (1931), 283 U. S. 791 (1931), 290 U. S. 590 (1933);
New Mexico v. *Colorado*, 267 U. S. 30 (1925), 268 U. S. 108 (1925);
Michigan v. *Wisconsin*, 270 U. S. 295 (1926), 272 U. S. 398 (1926);
Massachusetts v. *New York, et al.*, 271 U. S. 65, 636 (1926);
Wisconsin v. *Michigan*, 287 U. S. 571 (1932), 288 U. S. 588, 594 (1933), 295 U. S. 455 (1935), 297 U. S. 547 (1936);
Vermont v. *New Hampshire*, 289 U. S 593 (1933), 290 U. S. 589, 602 (1933), 290 U. S. 579, 605 (1934), 298 U. S. 642 (1936), 299 U. S. 519 (1936), 300 U. S. 636 (1937);
New Jersey v. *Delaware*, 291 U. S. 361, 648 (1934), 295 U. S. 694 (1935), 304 U. S. 590 (1938).

II. Water Rights Cases:

South Carolina v. *Georgia, et al.*, 93 U. S. 4 (1876);
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. ..... Original.

THE COMMONWEALTH OF MASSACHUSETTS,
Complainant,

vs.

THE STATE OF MISSOURI et al.,
Respondents.

BRIEF

On Behalf of Respondents, St. Louis Union Trust Company, Trustee, and St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees, on Question of Jurisdiction of the Court.

CHARLES M. ROGERSON,
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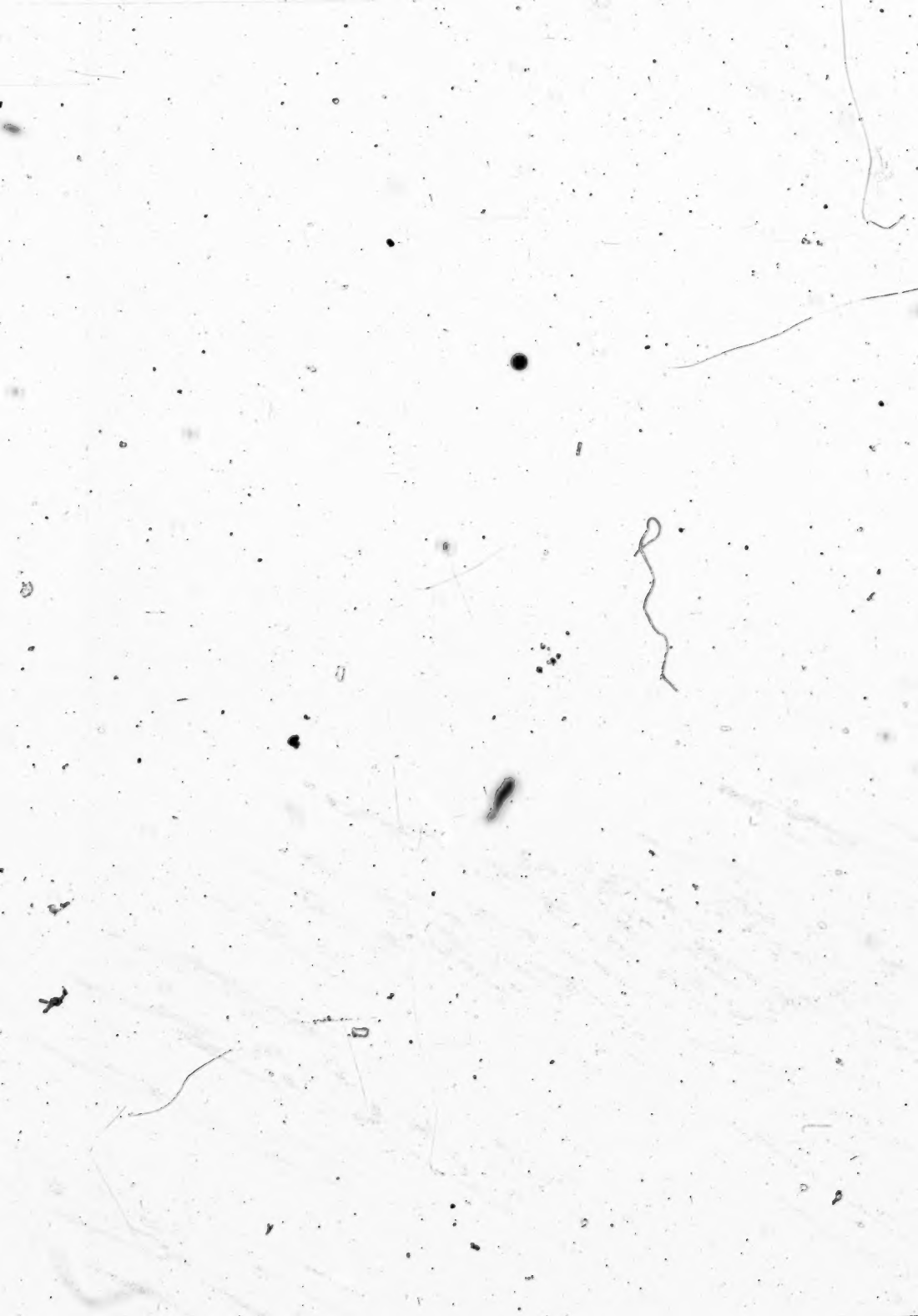

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BRIEF

On Behalf of Respondents, St. Louis Union Trust Company, Trustee, and St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees, on Question of Jurisdiction of the Court.

STATEMENT OF THE CASE.

On October 24, 1938, the Commonwealth of Massachusetts applied for leave to file a bill of complaint against: the State of Missouri; St. Louis Union Trust Company, as Trustee under indenture of trust made February 14, 1921, by Madge Barney Blake; St. Louis Union Trust Company, as Trustee under indenture of trust made January 11, 1929, by Madge Barney Blake; and St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, Trustees under indenture of trust made May 20, 1935, by Madge Barney Blake, as respondents.

On November 7, 1938, this Court entered its order requiring the respondents to show cause why leave should not be granted the complainant, the Commonwealth of Massachusetts, to file its bill of complaint. Separate returns were, pursuant to such order, filed by the respondent State of Missouri, and by the respondent Trustees.

On June 5, 1939, this Court set the cause for hearing on October 9, 1939, on the question of its jurisdiction.

From the allegations of the bill of complaint the following facts appear:

Mrs. Blake died on July 12, 1935, a citizen and resident of Massachusetts (Bill, § 6, p. 7). Prior to her death she had, by instruments respectively dated February 14, 1921, January 11, 1929, and May 20, 1935, transferred to St. Louis Union Trust Company, as Trustee, notes, bonds, shares of stock, and other intangible personal property, to be held in trust for uses and purposes defined in the instruments (Bill, §§ 3, 4, 5, pp. 4-7). By the terms of each of the instruments, she reserved the right to receive the net incomes of the various trust estates for and during her lifetime. The trusts of February 14, 1921, and May 20, 1935, were revocable (Ex. A, Sec. 4, Bill p. 28; Ex. C, Sec. 9, Bill p. 39). That of January 11, 1929, was irrevocable (Ex. B, Bill p. 33). The instruments provided for the complete disposition of the trust properties after the death of Mrs. Blake. Designed upon a common pattern, they made provisions for certain specific gifts and for the setting apart of certain trust funds for the benefit of named beneficiaries, the residue (and the remainders, after satisfaction of certain life interests and annuities) to pass to certain named charitable institutions, some of which existed under the laws of Missouri, some under the laws of Massachusetts, and some under the laws of other states. The respondents, Charles B. Maloy and Clarence E. Maloy,

became Trustees of the trust of May 20, 1935, upon the death of Mrs. Blake and according to the terms of the instrument of that date (Ex. C, Sec. 4, Bill p. 38).

Although it does not appear from the bill of complaint, it will be alleged, if leave be granted to file the bill, in any answer thereto, and presumably it will be admitted by the other parties, that Mrs. Blake had been a resident of Missouri until her marriage on June 23, 1913, to Dr. John Bapst Blake, and that the creation of the trusts in Missouri was the outgrowth of her long prior residence in Missouri and represented continued transaction of her business through financial institutions in Missouri with whom she had been accustomed to deal.

The aggregate market value of the three trust estates at the death of Mrs. Blake was ~~$1,850,789~~.77 (Bill, § 7, p. 8).

Mrs. Blake left a will which was admitted to probate by the Probate Court of the County of Suffolk, Massachusetts, and a small estate valued at $12,646.02 was administered by the Boston Safe Deposit and Trust Company, as Executor under the will (Bill, § 8, p. 8). This probate estate was fully exhausted by the payment of costs of administration and Federal estate taxes. For the purpose of the Federal estate tax, the value of the assets in the three trust estates was included in the gross estate of the decedent (Bill, § 9, p. 9).

The bill of complaint discloses further that after the death of Mrs. Blake, both Massachusetts and Missouri sought, under their respective inheritance tax laws duly pleaded, to exact an inheritance or succession tax, computed upon the value of the assets included in the three trust estates at the date of Mrs. Blake's death (Bill, §§ 10, 11, 12, 13, pp. 9-13). Massachusetts claims inheritance or succession taxes aggregating $137,000.00 (Bill, p. 13) and Missouri claims inheritance or succession taxes aggre-

gating $182,349.69 (Bill, p. 11), computed in each case upon the value of the same trust assets. Assuming that such taxes are exigible in respect of the assets of all three trusts, by either of the states, the amount of the taxes claimed by such state is not in dispute.

The Commonwealth of Massachusetts was confronted by a situation where (as pleaded) there were "no persons or property subject to the processes of the courts of" Massachusetts "against whom or which the Commonwealth may proceed in the collection or attempted collection of its said tax, for the reasons that the assets composing the estate in Massachusetts would be exhausted in the payment of administration expenses and Federal estate taxes and that the Statute of the Commonwealth purports to levy and assess succession taxes upon the Trustees with respect to the trust property and not upon the Executors" (Bill, § 15, p. 13).

Missouri in turn was confronted with the provisions of its own reciprocity statute (R. S. Mo. 1929, Section 576), which provided that the tax imposed by its inheritance tax law should not be payable in respect of personal property (except tangible personal property having an actual *situs* in Missouri) if the transferor at the time of his or her death was a resident of a state which, at the time of his or her death, "did not impose a transfer tax or death tax of any character in respect of property of residents" of Missouri (except tangible personal property having an actual *situs* in the foreign state) (Bill, § 10, p. 10). Massachusetts was a state which at the death of Mrs. Blake did not impose a transfer tax or death tax in respect of intangible personal property of residents of foreign states, including residents of Missouri, and Mrs. Blake was a resident of Massachusetts (Bill, § 11, p. 12).

Under these circumstances Massachusetts asked leave to file its original bill in this Court.

The respondent Trustees filed a return in substance admitting that the case fell within the constitutional jurisdiction of this Court, but denying that a cause of action was stated in the bill of complaint entitling the complainant to the relief prayed. Among other things, it was asserted in the return that Massachusetts could not, through the jurisdiction of this Court, levy or collect its asserted succession tax, because neither the property transferred nor the persons owning it are within the reach of the processes of the Courts of Massachusetts.

ARGUMENT.

I. The Controversies in This Case Are Justiciable Because They Are of a Civil Nature and Arise Between States of the Union and Between a State and Citizens of Another State— A Preliminary Statement.

It is asserted by Massachusetts that this Court has original jurisdiction in this case under Article III, Section 2, of the Constitution of the United States, because:

1. There is presented a controversy between two or more states, and

2. There is presented a controversy between a state and citizens of another state.

There is no question concerning the sufficiency of the parties requisite under the constitutional provision. Relief is sought by one state against another and by a state against citizens of another state.

The sole question is whether the proposed bill of complaint states a "controversy" between Massachusetts and Missouri, or a "controversy" between Massachusetts and the respondent Trustees, or both.

To determine whether such controversies exist presupposes an analysis of the claimed grievances of the respective parties as disclosed by the pleadings. Although the permission granted by the Court to argue this case is expressly limited to questions of jurisdiction, we trust that indulgence may be granted to a brief examination herein of the issues involved. By examination of such issues, it is not intended to argue their merits and thus to trespass the limits fixed by the Court's order, but to demonstrate the points at which the interests of the respective parties hereto clash, giving rise to justiciable controversies.

It is not intended here to place emphasis upon the existence of a controversy between Massachusetts and the respondent Trustees, since the considerations affecting a controversy between such parties have been developed in the brief for the complainant. If it be assumed, as there contended, for the purposes of this argument only, that Massachusetts may lawfully claim a tax against trustees and trust property outside its boundaries and collect such tax extraterritorially, its attempt in this suit to enforce its claim over the objection of the respondent Trustees constitutes a controversy of the kind referred to in the Constitution because it is asserted by right alleged to be contractual in nature. Moreover, the remedy for the collection of such tax provided by Massachusetts laws (General Laws, chapter 65, section 33) is by action in the nature of an action in contract, or by a suit in equity. Massachusetts' pursuit of a tax gives rise to a controversy of civil and justiciable character. Whether it can succeed or not, in the face of the objections of the respondent Trustees to extraterritorial vitality and extraterritorial enforcement of the Massachusetts tax laws, is a question which would seem to bear, not upon whether there is a controversy between a state and citizens of another state, but upon whether the relief prayed may be granted.

The controversies presented by this case go much deeper than merely the claim of Massachusetts to tax intangibles held in trust in Missouri. Out of a single situation arise controversies in which two states and a group of individual Trustees are involved, with claims of one state against the other, of both states against the Trustees, and of the Trustees against both states, and in all of these controversies and claims all of the parties are concerned. These controversies are of a civil nature involving asserted extraterritorial extensions of taxing power, the

obligatory force of reciprocal exemption laws, and the alleged obligations of the respondent Trustees under the taxing laws of two states. This will appear from the considerations discussed under headings III and IV of this brief.

II. Such Controversies Exist Notwithstanding the Absence of Constitutional Restraints on Double Taxation.

The questions raised in this case have not been decided by the recent decisions of this Court in the cases of *Curry v. McCanless* (1939), 59 Sup. Ct. 900, 83 L. Ed., Adv. Op. 865, and *Graves v. Elliott* (1939), 59 Sup. Ct. 913, 83 L. Ed., Adv. Op. 880. Those cases dealt solely with the constitutional power of states to tax property within the borders of each, exerted within those borders through the courts of each state. Here there is presented an attempt by Massachusetts to impose a tax and a tax lien upon persons and property outside its own borders and to collect that tax in other courts than its own, and an attempt by Missouri to nullify or disregard its own reciprocal exemptions from taxation of intangibles of nonresidents. It thus appears that because of the facts in this case, and the reciprocal exemption contained in the law of Missouri, there can here be only one tax, if in truth there can be any tax at all. In such a situation a controversy arises appropriately to be decided by a court upon an analogy to interpleader under the principle recently decided by this Court in *State of Texas v. State of Florida* (1939), 306 U. S. 398 (Preliminary Print), 59 Sup. Ct. 563, 83 L. Ed., Adv. Op. 549, herein sometimes referred to as the "Green case."

One of the intendments of the pleader of the proposed bill of complaint was to invoke a jurisdiction analogous to that invoked in the Green case, but postulated upon the assumption of a system of single taxation resulting from constitutional restraints. Proceeding from the assumption

that a decedent could have had but one domicile, and that but one state could impose an inheritance or succession tax in the right of a domiciliary state, there was discernible in the Green case a clash between the claims of the various states to the domicile and the resultant tax. The pleader of the bill of complaint herein, proceeding upon the assumption then in acceptation (under *Farmers Loan & Trust Company v. Minnesota* [1930], 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, and *First National Bank v. Maine*, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313), that only one state had the constitutional power to impose a succession tax in respect of intangible personal property, obviously saw in the conflicting claims of Massachusetts, as the state of Mrs. Blake's domicile, and Missouri, as the state wherein the trusts were created and managed, the source of an analogous jurisdiction.

The same sort of jurisdiction continues to exist in this case under a statutory, as distinguished from a constitutional, system of single taxation under which there come before the Court the new problems of interstate adjustment inherent in such a system.

III. Controversies Between the States of Massachusetts and Missouri Arise Because Each Denies the Right of the Other to Tax.

(a) *A controversy arises from the assertion by Massachusetts of the vitality of its tax laws in Missouri.*

Throughout the Eighteenth and Nineteenth Centuries English Courts have announced the doctrine in *dicta* that no nation will take notice of the revenue laws of another.

Boucher v. Lawson (1734), Cas. T. Hard. 85, 95 Eng. Rep. 53, 55, 127;

Holman v. Johnson (1775), 1 Cowp. 341, 98 Eng. Rep. 1120;

Planche v. Fletcher (1779), 1 Doug. 251, 99 Eng. Rep. 164;

Sharp v. Taylor (1849), 2 Phill. 801, 41 Eng. Rep. 1153;

Emperor of Austria v. Day (1861), 3 De G. F. & J. 217, 45 Eng. Rep. 861.

See John L. Freeze, "*Extraterritorial Enforcement of Revenue Laws,*" XXIII Washington University Law Quarterly 321.

The principle became crystallized in England in two leading cases in which it was sought to enforce in English courts the payment of taxes to a foreign taxing authority: In *Municipal Council of Sydney v. Bull* (1909), 1 K. B. 7, where the Court denied enforcement of a street improvement tax as against the English owner of property in Sydney, New South Wales; and in *H. M. the Queen of Holland v. Drukker* (1928), 1 Chancery 877, where the Court denied enforcement in England of succession taxes claimed under a Dutch statute against personalty held in England by a Dutch decedent.

In America the doctrine has been followed and applied in:

Ludlow v. Van Rensselaer (N. Y. 1806), 1 Johnson 94;

Maryland v. Turner (1911), 75 Misc. Rep. 9, 132 N. Y. S. 173;

Colorado v. Harbeck (1921), 232 N. Y. 71, 133 N. E. 357;

New York Trust Company v. Island Oil & Transport Corporation (C. C. A. 2, 1926), 11 Fed. (2) 698;

Moore v. Mitchell (C. C. A. 2, 1929), 30 Fed. (2) 600, Affirmed on a limited ground in (1930) 281 U. S. 18, 50 S. Ct. 175, 74 L. Ed. 673.

This Court has twice touched upon the problem, but in each instance found it unnecessary to decide whether a

state might have extraterritorial enforcement of its revenue laws in an original action outside the taxing state, as distinguished from a suit on a judgment obtained in the taxing state on personal service. Thus in *Moore v. Mitchell*, supra, where the Circuit Court of Appeals for the Second Circuit had held that a complaint for delinquent taxes by the County Treasurer of Grant County, Indiana, failed to state a cause of action because the Court could not enforce the revenue laws of a foreign jurisdiction, this Court upheld the result on the ground that the county officers had no standing to bring suit in courts outside of Indiana, saying that it was unnecessary to consider the question whether a Federal Court in one state would enforce the revenue laws of another state. And in *Milwaukee County v. M. E. White Company* (1935), 296 U. S. 268, 56 S. Ct. 229, 80 L. Ed. 220, it was held that full faith and credit should be given in a Federal Court sitting in one state to a judgment for taxes rendered on personal service under the laws and in the courts of another state, the question whether there could be original enforcement outside the taxing state again being reserved.

Examination of the underlying reasons for the doctrine denying extraterritorial enforcement belongs to an argument on the merits. It will suffice to point out here that the issues, as suggested by *Colorado v. Harbeck*, supra, and *Moore v. Mitchell*, supra, go deeper than objections to extraterritorial collection. They involve questions of the vitality of the taxing law itself when sought to be applied to raise obligations and impose liens within the confines of another state.

Quite aside from treating revenue laws as unenforceable outside the state because assimilable to penal laws, and starting from the premise that revenue laws create obligations contractual in nature (*Milwaukee County v. M. E. White Company*, supra), the attempt of Massachu-

setts here is to impose a contractual liability upon trustees who neither made themselves amenable to, nor sought the protection in any way of, the Commonwealth, and to reach over into Missouri in the attempted impressment of a lien on assets held in Missouri.

Thus Massachusetts is not attempting merely to enforce outside her boundaries a liability which accrued within them, but is attempting to base her right upon revenue laws claimed to have extraterritorial effect, and thus to extend the force of her legislation into the realm of another sovereign, so as to impose an obligation against trustees there resident and create a lien on property there located.

That other sovereign, Missouri, of necessity has an interest in the question whether the revenue legislation of Massachusetts may penetrate the boundaries of Missouri. If it may, then a new principle is injected into the law of interstate relations, requiring each state to recognize her sister states as sharing with her, to the extent not prohibited by the Constitution, the taxing power over her subjects and property within her boundaries, and to relinquish her exclusive power over such objects. The assertion of the claim by Massachusetts creates a conflict, supporting the jurisdiction of the Court. The validity of the assertion is another matter.

(b) *A controversy arises from the denial by Missouri of the effect of her reciprocity statute.*

Despite a holding that the Constitution does not inhibit the exaction by two states of an inheritance tax measured by the value of the same property where the owner has divided the incidents of ownership between the two jurisdictions, single taxation has always been regarded by this Court as a desirable end to be brought about by reciprocal legislation. Thus it was said by Mr. Justice Holmes in

Kidd v. Alabama (1903), 188 U. S. 730, at page 732, 23 S. Ct. 401, 47 L. Ed. 669:

> "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

And it was said by Mr. Justice Stone in *Curry v. McCanless*, supra, 83 L. Ed. Adv. Op., at 875:

> "If we enjoyed the freedom of the framers it is possible that we might, in the light of experience, devise a more equitable system of taxation than that which they gave us."

The movement towards reciprocity in inheritance taxation received its impetus in the recommendation of the National Conference of the National Tax Association at its meeting held in 1924. (See statement of the history in the opinion of Judge Cardozo in *City Bank Farmers' Trust Company v. New York Central Railroad Company* (1930), 253 N. Y. 49, 170 N. E. 489, 490.)

At that time Massachusetts had already made a contribution to a system of single taxation of inheritances by enacting a reciprocity statute. Her legislation from time to time varied between partial reciprocity, complete reciprocity and total exemption of intangible personal property of nonresidents. (See Complainant's Brief, p. 16.) The reciprocity statutes of Massachusetts were given liberal interpretation and effect by the courts. *Bliss v. Bliss* (1915), 221 Mass. 201, 109 N. E. 148. At the death of Mrs. Blake, Massachusetts granted complete exemption from succession taxation upon intangible personal property of nonresident decedents.

Missouri came into this system of single taxation in 1929 (Laws of 1929, pages 102-103) by enacting the following statute (R. S. Mo. 1929, Sec. 576):

> "Sec. 576. *Reciprocity.*—The tax imposed by this article in respect of personal property (except tangible personal property having an actual situs in this state) shall not be payable (a) if the transferor at the time of his death was a resident of a state or territory of the United States, or of any foreign country, which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of residents of this state (except tangible personal property having an actual situs in such state or territory or foreign country), or, (b) if the laws of the state, territory or country of residence of the transferor at the time of his death contained a reciprocal exemption provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein), provided the state, territory or country of residence of such nonresidents allowed a simliar exemption to residents of the state, territory or country of residence of such transferor * * *."

The extent of reciprocal legislation was commented upon in *Farmers Loan & Trust Company v. Minnesota* (1930), 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, where it was said that thirty-five states had already in some form granted relief against double taxation.

All of these developments arose from a clear recognition by the states themselves of the iniquity of multiple state taxation of inheritances, and presumably also of the anachronism inherent in subjecting the same property to taxation twice merely because the owner in the course of his business transactions had placed certain incidents of his ownership in a state other than that of his domicile.

Multiple taxation was a penalty imposed on other than purely local dealings.

In view of the holding in *Curry v. McCanless,* supra, and *Graves v. Elliott,* supra, the need for reciprocal legislation to avoid the evils of double taxation becomes of paramount importance. See, Dudley W. Orr, *"Reciprocal Exemptions from Inheritance Taxation,"* 18 Boston University Law Review 39.

Despite the existence at the death of Mrs. Blake of the reciprocity statute in Missouri, and despite the exemption from taxation, granted by the laws of Massachusetts in existence at that time, of the intangible personal property of residents of Missouri, Missouri has refused to give effect in the instant case to the exemption conferred.

Has not Massachusetts an interest in the question whether Missouri legally withholds the relief?

The Constitution, Article I, Section 10, withholds from the states the power to enter into agreements or compacts with each other without the consent of Congress. Reciprocity did not reach the dignity of compacts or agreements between states, but the enactment of mutual resiprocity laws did amount to the assumption of mutual obligations between the states. Each state, in the enactment of a reciprocity statute or in the grant of exemption from succession taxes on the intangible personal property of nonresidents, undoubtedly incurred a detriment to its revenue in the interest of exercising its taxing powers in respect of its own citizens and their estates to the exclusion of other states. There was something of the nature of a continuing, although revocable, offer to other states, for the duration of a reciprocity law, to grant exemptions in respect of property of citizens of other states, if the states of their domiciles granted similar exemptions in respect of property of citizens of the legislating state. This was not mere comity, since it contemplated a quid pro quo.

Fairly viewed in the light of historical backgound and in the light of the purposes sought to be accomplished, the Missouri reciprocity statute was more than a mere exemption law. It held forth a promise to grant certain exemptions in respect of property of citizens of other states if the states of their domiciles granted exemptions in respect of property of citizens of Missouri. The circumstances were such that action or forbearance in fulfillment of the conditions by other states should reasonably have been expected by Missouri, and the action or forbearance called for and induced by the enactment was definite and substantial. Massachusetts, induced by exemptions and reciprocal legislation offered by other states, among which Missouri included itself, maintained in force at the death of Mrs. Blake its law exempting intangible personal property of nonresidents, and by so doing forbore imposing a tax in respect of property of Missouri decedents, with definite and substantial detriment to its revenues.

While analogies betwen obligations of sovereign states and obligations of private individuals may not be entirely apt, and judicial relief may be granted to a sovereign state under circumstances which would not justify the relief if the suit were between private parties (*Florida v. Mellon* [1927], 273 U. S. 12, 16, 47 S. Ct. 265, 71 L. Ed. 511; *Missouri v. Illinois* [1906], 200 U. S. 496, 26 S. Ct. 268, 50 L. Ed. 572), yet it appears that the nature of Missouri's obligation to Massachusetts is much like the contractual obligation expressed in Sections 85 and 90 of the *American Law Institute's Restatement of the Law of Contracts*:

> "§ 85. When Assent or Consideration Unnecessary.
>
> "Neither a manifestation of assent, unless the promise is in terms conditional upon such a manifestation, nor consideration is requisite for the formation of an informal contract in the cases enumerated in §§ 86-90."

"§ 90. Promise Reasonably Inducing Definite and Substantial Action.

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

See, also:

Williston on Contracts, Revised Edition by Samuel Williston and George J. Thompson, §§ 139-140;
Porter v. Commissioner of Internal Revenue (C. C. A. 2, 1932), 60 Fed. (2) 673;
Carter v. Burns (1933), 332 Mo. 1128, 1144, 61 S. W. (2d) 933;
Underwood Typewriter Company v. Century Realty Company (1909), 220 Mo. 522, 526, 119 S. W. 400.

The estates of Missouri decedents having been benefited by the tax forbearance of Massachusetts, induced, fairly considered, by reciprocity of numerous states, including Missouri, the latter is in an inequitable position and injustice can be avoided only by the enforcement of Missouri's promise.

The interest of a state such as Massachusetts granting an exemption and claiming reciprocity transcends an interest in the individual benefits to accrue to its own citizens (Cf. *Florida v. Mellon* [1927], 273 U. S. 12, 16, 47 S. Ct. 265, 71 L. Ed. 511). It is a public interest which Massachusetts has in the reciprocal exemptions upon which its own exemptions are postulated.

Missouri should not be permitted, unless she can show just cause, to violate her statute when her citizens are entitled to exemptions in Massachusetts. There would be a constitutional inhibition against the subsequent with-

drawal of the benefit conferred at the date of Mrs. Blake's death (Cf. *City Bank Farmers' Trust Company v. New York Central Railroad Company*, supra).

It has been suggested that agreements under the compact clause of the Constitution furnish a field for interstate adjustment of tax problems (Frankfurter and Landis, *"The Compact Clause of the Constitution—A Study in Interstate Adjustments,"* 34 Yale Law Journal, 685, 704). Reciprocity, it is believed, furnishes an expedient of accord without violation of the compact clause, for the obligation arising out of reciprocal legislation is not such as requires the consent of Congress. This is true because:

(1) The obligation, although contractual in nature, is not rested upon manifestation of assent so as to fall within the meaning of "compact" or "agreement" in the constitutional sense, and

(2) There is no interest of the United States involved.

The classic statement of the latter principle is that of Mr. Justice Field in the boundary case, *State of Virginia v. State of Tennessee* (1893), 148 U. S. 503, at pages 518-519, 13 S. Ct. 728, 37 L. Ed. 537:

> "If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?
>
> "We can only reply by looking at the object of the constitutional provision and construing the terms 'agreement' and 'compact' by reference to it. • • • Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in

the states, which may encroach upon or interfere with the just supremacy of the United States."

See, also:

Stearns v. Minnesota (1900), 179 U. S. 223, 244-245, 21 S. Ct. 73, 45 L. Ed. 162;
Union Branch Rail Road Co. v. East Tennessee and Georgia R. R. Co. (1853), 14 Ga. 327, 339;
State v. Joslin, 116 Kans. 615, 618-619, 227 P. 543.

From the standpoint of this Court, there is presented a problem of co-ordinating and adjusting the reciprocal legislation of states which have contributed by their legislation to the end of achieving a nation-wide system of single state taxation of inheritances.

(c) *A controversy arises on the part of each state against the other by reason of the effect of the other's tax upon its public charities.*

Under the trust instruments executed by Mrs. Blake, the residue of the property transferred in trust and funds remaining in the hands of the Trustees after termination of any trusts specially created are distributable to and among specified charities (Ex. A, Bill, p. 25; Ex. B, Bill, p. 34). Among the charities so entitled are charities located in Massachusetts and other charities located in Missouri. The proposed tax by Massachusetts is computed upon the value of the trust assets without deduction of the value of the property going to the Missouri charities, and the proposed tax by Missouri is computed upon the value of the trust assets without deduction of the value of the property going to the Massachusetts charities.

From early times in England and in America public charities have been regarded as public blessings, the sovereign has been regarded as interested as *parens patriae* in giving force and effect to them, and the Attorney-Gen-

eral, in the case of the states, has been regarded as a proper party to enforce and protect charitable trusts.

Burbank v. Burbank (1890), 152 Mass. 254, 25 N. E. 427;
Dickey v. Volker (1928), 321 Mo. 235, 11 S. W. (2) 278, 62 A. L. R. 865-866;
Schell v. Leander Clark College (D. C. Ia., 1926), 10 Fed. (2) 542, 554;
Zollman, *American Law of Charities*, Sec. 613;
10 Am. Jur., Charities, Sec. 121, p. 672.

Presumably the exemptions from taxation accorded by each state to the charities existing within its own domain were granted because they relieve the public treasury by doing the work which otherwise the sovereign would be required to undertake. By the same token, there is a direct financial interest by the one state in the burdens which are sought to be cast upon its charities by the taxing laws of another state.

IV. Controversies Between the States and Between Each of the States and the Respondent Trustees Arise Out of the Attempts of Each State to Collect a Tax Upon the Trust Property in Missouri.

The respondent Trustees are confronted with conflicting responsibilities: on the one hand, with their responsibility not to make distribution of the trust assets without satisfying all tax liabilities which may constitute liens on such assets, and on the other hand, with the responsibility to the beneficiaries of the trusts not to dissipate the trust assets by payment of taxes for which no valid claim may exist.

Although Mrs. Blake, because of her reservation of powers of revocation, may have made transfers of such nature that they may be subjected to state inheritance or succession taxation by appropriate legislation, and al-

though, because she divided among two jurisdictions the incidents of her ownership, it may be assumed that no constitutional inhibition exists against the imposition by more than one state of such tax, yet the respondent Trustees still must urge, as against Massachusetts, that her laws cannot have extraterritorial effect, and against Missouri, that by her reciprocity statute she waived the tax.

The respondent Trustees are under attack by both states, not knowing which, if either of them, can validly collect a tax, and out of this situation, it is submitted, arise controversies justiciable by this Court involving all of the parties to the proposed bill of complaint.

This is true because of the presence of the following elements:

(a) *The subject matter is single.*

All disputes arise out of a single set of facts, have the same subject matter, namely, the transfers made by Mrs. Blake during her lifetime, and concern identical successions to the beneficial interests in the trust estates. The claims made by the two states are of the same nature, claims for taxes in respect of the same property by reason of the same transfers.

(b) *With the existence of reciprocity, there can be not more than one tax payable.*

Not only do the laws of Missouri enacting reciprocity define an exemption running in favor of the succession from a Massachusetts resident, but they give rise, as hereinbefore contended, to obligations of contractual nature of Missouri to Massachusetts under which the successors in title to Mrs. Blake are the beneficiaries. In spite of the existence of such reciprocity, both states assert the right

to a tax and subject the respondent Trustees to a double risk under a system of taxation intended by both states to be single.

(c) *There being not more than a single liability, damage to the respondent Trustees arises from the multiple assertion of claims.*

Essentially the dilemma of the respondent Trustees is the same as confronted the executors of the Green estate in *State of Texas v. State of Florida*, supra, where the Court determined that a justiciable controversy existed in the nature of an interpleader. The Court, after pointing out that the sole ground for equitable relief in interpleader is the danger of injury because of the risk of multiple suits when the liability is single, made the following statement, submitted to be equally applicable to the case at bar, 306 U. S. 398, at 407-408 (Preliminary print):

> "When, by appropriate procedure, a court possessing equity powers is in such circumstances asked to prevent the loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims, a justiciable issue is presented for adjudication which, because it is a recognized subject of the equity procedure which we have inherited from England, is a 'case' or 'controversy,' within the meaning of the Constitutional provision; and when the case is one prosecuted between states, which are the rival claimants, and the risk of loss is shown to be real and substantial, the case is within the original jurisdiction of this Court conferred by the Judiciary Article. See *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 261 et seq., and cases cited."

The risk of damage to the respondent Trustees here is real and substantial in that they too may be subjected to separate suits under a statutory system of single taxation. Moreover, in dealing with Massachusetts and Missouri in

separate suits, the respondent Trustees would be bound to advance in each case the claims of the other state and might readily be met in litigation with Missouri by arguments based upon infractions by Massachusetts of its statutory exemptions to residents of Missouri. Their defenses may be of a character which can theoretically or practically be made only by the other state over which no jurisdiction would exist.

(d) *The assumption of jurisdiction by this Court of the controversies would avoid a multiplicity of suits.*

But for the assumption of jurisdiction by this Court, a separate suit would have to be brought to determine the right of Massachusetts who has within its jurisdiction no persons or property subject to the processes of its courts "against whom or which the Commonwealth may proceed in the collection or attempted collection" of its tax. Such a suit, due to the constitutional issue involved, might ultimately reach this Court for final adjudication as to whether the statutes of Massachusetts may have extraterritorial vitality or may be enforced extraterritorially. Likewise, but for the assumption of jurisdiction by this Court, a separate suit would be required to determine whether despite the reciprocity statute a lien exists in favor of Missouri for any inheritance or succession taxes. Such a suit, to the extent that it involved interpretation of the nature of the obligation of Missouri upon contract not to tax the succession from residents of Massachusetts as distinguished from mere construction of its terms, might readily find its way to this Court for final adjudication. Hence, the assumption of jurisdiction by this Court is in the interest of avoiding a multiplicity of suits in respect of the same subject matter.

The issues, whether, under the reciprocal situation existing between these states, there can be more than one tax,

whether Massachusetts' revenue laws can have effect in Missouri, and whether Missouri has just cause for not applying reciprocity, are all issues in which each of the proposed litigants are vitally interested. They have their fulcrum in the singleness of liability of the respondent Trustees. The existence of this situation clearly discloses that the controveries involved are justiciable and should be adjudicated in one suit.

(e) *The existence of controversies capable of being initiated in other courts presupposes the original jurisdiction of this Court.*

It follows from the interrelationship between the controversies—an interrelationship derived from the conflict of interest of each state in the claim of the other and from the interposition of claims of the respondent Trustees giving rise to a controversy in the nature of an interpleader—that original jurisdiction exists in this court because of the parties involved. If it be suggested that the case presents controversies which should be initiated in Courts other than this Court, and which might reach this Court by appellate procedure, such suggestion, in view of the interrelationship of the controversies, would impliedly admit original jurisdiction, since there are controversies between states and between a state and citizens of another state. The reasoning would admit that the controversies are justiciable because they could be entertained by a Court, and, therefore, this Court having jurisdiction, should not decline it.

V. A Public Interest Is Involved.

Since the decisions in *Curry v. McCanless*, supra, and *Graves v. Elliott*, supra, holding that in a situation such as this, single taxation is not to be achieved by constitutional restraint, it becomes of paramount importance that

rights arising out of efforts by the states themselves to bring about single taxation be clarified and defined. The situation here presented, in which the state of the domicile of the decedent is without jurisdiction over persons or property enabling its tax to be levied and collected within its boundaries, and in which the state of the domicile of the trustees and of the location of the trust property has waived its tax, and in which both states assert a tax and the right to interfere with and deal with the disposition of the property as if each had a right to a tax, requires the supervisory action of this Court. There is not involved merely a question of the rights of the states for themselves and their own financial interests, but also the rights of the states acting or forbearing to act in order to protect and promote the interests of their residents.

Although this Blake case in itself presents issues of public importance and of sufficient magnitude, the issues affect interstate relations in general and the supervisory action of this Court would be in the interest of maintaining harmony in such interstate relations.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. —, Original.—October Term, 1939.

Commonwealth of Massachusetts, Complainant,
vs.
State of Missouri, et al.

Motion for leave to file bill of complaint.

[November 6, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Commonwealth of Massachusetts asks leave to file a bill of complaint against the State of Missouri and certain citizens of that State. On return to the order to show cause why leave should not be granted, the respondents, while contesting the claims of Massachusetts, stated that they had no cause to show. The Court set the motion for hearing upon the question whether the Court has jurisdiction to entertain the suit. The complainant and the individual respondents contend that the Court has jurisdiction and the State of Missouri now presents the contrary view.

The argument for jurisdiction rests upon two grounds, (1) that there is a controversy between two States, and (2) that there is a controversy between a State and citizens of another State. Constitution, Article III, section 2, paragraphs 1 and 2.

The proposed bill of complaint alleges in substance that Madge Barney Blake, domiciled in Massachusetts, died in 1935 leaving an estate in that State of $12,646.02, which has there been administered, and that this estate will be exhausted by costs of administration and federal taxes; that the decedent, while domiciled in Massachusetts, created three trusts of securities of the value (at the time of death) of $1,850,789.77, the trustees being residents of Missouri where the securities are held; that in two of these trusts, embracing the greater part of the securities, the settlor had reserved the right of revocation; that both Massachusetts and Missouri have inheritance tax statutes subjecting to taxation property passing by deed, grant or gift made or intended to take effect in

possession or enjoyment after the death of the donor; that the Massachusetts statute imposes the tax upon intangibles only when owned by inhabitants of that State; that the Missouri statute exempts from the tax intangibles owned by non-residents who reside in States extending reciprocal provisions to residents of Missouri; that in this instance both States are claiming the exclusive right to impose inheritance taxes upon the trust estates; that Missouri intends to exercise its jurisdiction over the trustees and the property to the exclusion of Massachusetts; that Massachusetts has taken the action required by its statutes to determine the amount of the tax, and to certify it to the persons by whom it is payable, and that there is now due to Massachusetts from the respondent trustees $137,000, if all the trust estates are taxable, and $127,000 if only the property under the two revocable trusts is taxable; and that the tax cannot be collected from any persons or property in Massachusetts.

Alleging the absence of adequate remedy save in this Court sitting as a court in equity, the complainant prays that the Court may adjudge whether Massachusetts or Missouri has "the jurisdiction and lawful right to impose transfer, succession or inheritance taxes" in respect of the several transfers described and to determine that question in favor of Massachusetts. There is also a general prayer for other relief by injunction or otherwise as the Court may deem expedient.

First.—The proposed bill of complaint does not present a justiciable controversy between the States. To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. *Florida* v. *Mellon*, 273 U. S. 12, 16, 17; *Texas* v. *Florida*, 306 U. S. 398, 405. Missouri, in claiming a right to recover taxes from the respondent trustees, or in taking proceedings for collection, is not injuring Massachusetts. By the allegations, the property held in Missouri is amply sufficient to answer the claims of both States and recovery by either does not impair the exercise of any right the other may have. It is not shown that there is danger of the depletion of a fund or estate at the expense of the complainant's interest. It is not shown that the tax claims of the two States are mutually exclusive. On the contrary, the va-

lidity of each claim is wholly independent of that of the other and, in the light of our recent decisions, may constitutionally be pressed by each State without conflict in point of fact or law with the decision of the other. *Curry v. McCanless,* 307 U. S. 357; *Graves* v. *Elliott,* 307 U. S. 383. The question is thus a different one from that presented in *Texas* v. *Florida, supra,* where the controlling consideration was that by the law of the several States concerned only a single tax could be laid by a single State, that of the domicile. This was sufficient basis for invoking the equity jurisdiction of the Court, where it also appeared that there was danger that through successful prosecution of the claims of the several States in independent suits enough of the estate would be absorbed to deprive some State of its lawful tax. *Texas* v. *Florida, supra,* 405 406; 408, 410.

Massachusetts urges that a controversy has arisen over the enforcement of the reciprocal provisions of the tax statutes of the two States. It is said that Missouri has enacted reciprocal legislation under which there is exempted from taxation the transfer of intangibles where the transferor at the time of death was a resident of a State which at that time did not impose a transfer or death tax in respect of the intangible property of residents of other States or if the laws of the State of residence contained a reciprocal exemption provision (Missouri Rev. Stat. 1929, c. 1, art. 21, sec. 576); and that Massachusetts since 1927 (St. 1927, c. 156) has granted complete exemption from the inheritance tax to intangible property not belonging to its inhabitants. Mass. General Laws (Ter. Ed.) c. 65, sec. 1. The argument is that Massachusetts and its residents are entitled to the immunity offered by the Missouri statute.

But, apart from the fact that there is no agreement or compact between the States having constitutional sanction (Const. Art. I, sec. 10, par. 3), the enactment by Missouri of the so-called reciprocal legislation cannot be regarded as conferring upon Massachusetts any contractual right. Each State has enacted its legislation according to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation. Each State is competent to construe and apply its legislation in the cases that arise within its jurisdiction. If it be assumed that the statutes of the two States have been enacted with a view to reciprocity in operation, nothing is shown which can be taken to alter their essen-

tial character as mere legislation and to create an obligation which either State is entitled to enforce as against the other in a court of justice.

The suggestion that residents of Massachusetts are entitled to the immunity offered by the Missouri statute is unavailing, as Massachusetts may not invoke our jurisdiction for the benefit of such individuals. *Oklahoma* v. *Atchison, T. & S. F. Rwy. Co.*, 220 U. S. 277, 286; *Oklahoma* v. *Cook*, 304 U. S. 387, 394.

Nor does the nature of the suit as one to obtain a declaratory judgment aid the complainant. To support jurisdiction to give such relief, there must still be a controversy in the constitutional sense (*Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240, 241) and as between the two States there is no such controversy here.

Second.—Complainant urges that jurisdiction may be sustained in the view that the proposed bill of complaint presents a controversy between Massachusetts and citizens of Missouri. The bill is not aptly framed so as to present such a controversy independently of a controversy between the States. The bill expressly states the issues presented as being (a) whether Massachusetts or Missouri has exclusive jurisdiction over the transfers in trust so as to have the taxing power, and (b) secondarily, whether the State having such jurisdiction can constitutionally reach one of the trusts in which the settlor reserved no right of revocation. And the specific relief sought is that the court may determine which State has the jurisdiction to tax and may award that jurisdiction to Massachusetts as against Missouri. If the gravamen of the proposed bill is deemed to be an assertion of a controversy between the States, jurisdiction to entertain the bill cannot be supported in the absence of the showing of such a controversy. Missouri cannot be brought into court by the expedient of making its citizens parties to a suit otherwise not maintainable against the State.

With respect to the second ground of invoking jurisdiction, as an independent ground, we are virtually asked to disregard the stated objective of the proposed bill, to treat it as amended so as to expunge claims against Missouri and to confine it to claims against the trustees; to consider the bill as no longer asking a declaratory judgment as to which State has power to tax, as not seeking relief in this court "sitting as a court of equity", but, in the light of the general prayer for other relief, as presenting a simple action

against the trustees to recover the amount of the tax claimed to be due Massachusetts irrespective of any claim of Missouri.

If it be possible to consider the proposed bill as thus stripped of its abortive allegations against Missouri and as presenting a cause of action so distinct from that primarily relied upon, still the invocation of our jurisdiction must fail. In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction in an action by a State merely to recover money alleged to be due from citizens of other States is necessary for the State's protection. In *Oklahoma* v. *Cook, supra,* we called attention to the enormous burden which would be imposed upon this Court if by taking title to assets of insolvent state institutions, including claims against citizens of other States, a State could demand access to the original jurisdiction of this Court to enforce such claims. To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it. We have observed that the broad statement that a court having jurisdiction must exercise it (see *Cohens* v. *Virginia,* 6 Wheat. 264, 404) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. *Canada Malting Co.* v. *Patterson Co.,* 285 U. S. 413, 422; *Rogers* v. *Guaranty Trust Co.,* 288 U. S. 123, 130, 131. Grounds for justifying such a qualification have been found in "considerations of convenience, efficiency and justice" applicable to particular classes of cases. *Rogers* v. *Guaranty Trust Co., supra.* Reasons not less cogent point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States.

In this instance it does not appear that Massachusetts is without a proper and adequate remedy. Clause 2 of Section 2 of Article

117 merely distributes the jurisdiction conferred by clause one. *Louisiana* v. *Texas*, 176 U. S. 1, 16; *Monaco* v. *Mississippi*, 292 U. S. 313, 321. The original jurisdiction of this Court, in cases where a State is a party, "refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal Courts; not to those cases in which an original suit might not be instituted in a federal Court". *Cohens* v. *Virginia*, *supra*, pp. 398, 399. With respect to the character of the claim now urged, we are not advised that Missouri would close its courts to a civil action brought by Massachusetts to recover the tax alleged to be due from the trustees. The Attorney General of Missouri at this bar asserts the contrary. He says that "it would seem that Massachusetts should be able to bring a suit against the trustees for the collection of its taxes, in either a Missouri state court or in a federal district court in Missouri" and that "such a suit would be of a civil nature and would present a justiciable case or controversy". We have said that the objection that the courts in one State will not entertain a suit to recover taxes due to another or upon a judgment for such taxes, is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes "not to the jurisdiction but to the merits", and raises a question which district courts are competent to decide. *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 272.

The motion for leave to file the proposed bill of complaint is denied.

It is so ordered.

Mr. Justice BUTLER took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.